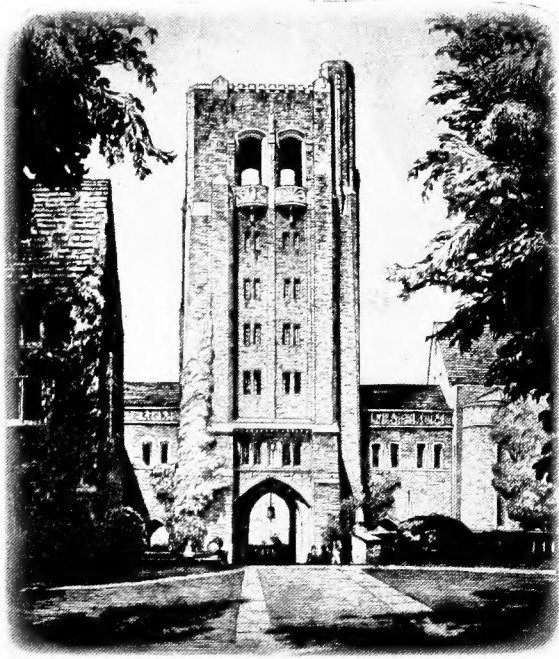


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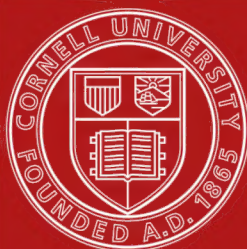
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A TREATISE
ON THE
LAW OF DAMAGES

EMBRACING
AN ELEMENTARY EXPOSITION OF THE LAW
AND ALSO
ITS APPLICATION TO PARTICULAR SUBJECTS OF
CONTRACT AND TORT

BY J. G. SUTHERLAND

AUTHOR OF A TREATISE ON "STATUTES AND STATUTORY CONSTRUCTION"

FOURTH EDITION
BY
JOHN R. BERRYMAN

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THE LAW OF DAMAGES.

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CHAPTER XXXVII.

DAMAGES RESULTING FROM DEATH.*

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§ 1259. No action for, at common law; admiralty gives statutes effect. By the common law all right of action for personal injury, whether it be the cause of death or not, is extinguished by the death of the injured party; the cause of action dies with the person entitled to sue.¹ By that law the death of a human

¹ Broom's Leg. Max. 400; Zabris- Dec. 545; Gulf, etc. R. Co. v. Beall, kie v. Smith, 13 N. Y. 322, 64 Am. 91 Tex. 310, 41 L.R.A. 807.

*See ch. 40, *post*, damages under the Federal Employers' Liability Act.

being is not a private wrong and no compensation therefor or for any resulting loss is recoverable.² The same doctrine prevails under the general maritime law where death is the result of negligence.³ Various reasons have been suggested to account for this rule; and it is probable that they have not wholly lost their force.⁴ The rule does not, however, prevent an action by the master for the loss of the services of his apprentice or by the husband for those of his wife by a wrongful personal injury though death ensue; since in these cases the action accrued to the master or husband, and no reasons exist for holding that the death of the injured servant or wife could affect it.⁵ By parity of reason, why should not the parent have his action for a like loss in case of injury to his infant child, notwithstanding the death of such child?⁶ In these cases the damages are not the result of the death but of the wrongful act disabling the person

² *Sherlag v. Kelley*, 200 Mass. 232, 19 L.R.A.(N.S.) 633, 128 Am. St. 414; *Gilkerson v. Missouri Pac. R. Co.*, 222 Mo. 173, 24 L.R.A.(N.S.) 844; *Duncan v. St. Luke's Hospital*, 113 App. Div. (N. Y.) 68; *Harshman v. Northern Pac. R. Co.*, 14 N. D. 69; *Shaw v. Charleston*, 57 W. Va. 433; *Insurance Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580; *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358; *Nickerson v. Harri-man*, 38 Me. 277; *Carey v. Berkshire R. Co.*, 1 Cush. 475; *Connecticut Mut. Ins. Co. v. New York R. Co.*, 25 Conn. 272, 65 Am. Dec. 571; *Green v. Hudson River R. Co.*, 28 Barb. 9, 2 Keyes 294; *Worley v. Cincinnati R. Co.*, 1 Handy 481; *Pennsylvania R. Co. v. Adams*, 55 Pa. 499; *Selma R. Co. v. Lacey*, 49 Ga. 106, 14 Am. Neg. Cas. 111, 218; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Indianapolis, etc. R. Co. v. Keely*, 23 Ind. 133; *Hyatt v. Adams*, 16 Mich. 180; *Kramer v. San Francisco St. R. Co.*, 25 Cal. 434; *Grosso v. Delaware, etc. R. Co.*, 50 N. J. L. 317; *Eden v. Lex-*

ington R. Co., 14 B. Mon. 204. See § 1273 for the rule in Louisiana.

³ *In re La Bourgogne*, 117 Fed. 261.

⁴ See *Hyatt v. Adams*, *Connecticut Mut. L. Ins. Co. v. R. Co.*, *Grosso v. R. Co.*, *Worley v. R. Co.*, *supra*.

⁵ *Indianapolis & M. R. T. Co. v. Reeder*, 42 Ind. App. 520.

Such cases are distinguishable from those in which death is the fact on which the right of action depends, as in *Connecticut Mut. L. Ins. Co. v. R. Co.*, *supra*, in which a life insurance company unsuccessfully sought to recover from a railroad company damages for negligently causing the death of a person whose life it had insured, thereby subjecting it to the payment of the policy.

⁶ *Eden v. R. Co.*, *Hyatt v. Adams*, *supra*; *Jackson v. Pittsburgh, etc. R. Co.*, 140 Ind. 241, 49 Am. St. 192; *Sorensen v. Balaban*, 11 App. Div. (N. Y.) 164.

Burial expenses of a child are the result of its death, and cannot

from whom the plaintiff had the right to service, and the recovery is limited to the loss during the interval between the injury and the death.⁷ But the rule is not so limited in some states.⁸ In England it is not so limited unless the death formed an essential part of the cause of action. Where the action was by the husband against the seller of unwholesome food which caused the death of the wife he recovered the increased expense incurred after her death in securing such services as she had customarily rendered in caring for his home and family; but could not recover the expenses of her funeral.⁹ In this country the last limitation is not everywhere recognized if death was not coincident with the injury; the husband has been permitted to recover, on common law principles, for the loss of the services of his wife, for his loss of time and the expense incurred in her burial.¹⁰

The common-law rule has been abrogated by statutes in all or nearly all the states of the Union as well as in England. These provide that compensation may be recovered for the injury or pecuniary loss resulting from the death of a person, caused by the wrongful act or negligence of another. For reasons connected with the public good this modern legislation has in special cases, and for the benefit of particular persons and to a limited amount, created a liability for injuries resulting from death where caused by misconduct of a certain specified character. These enactments subject the wrong-doer to damages

be recovered except under a statute. *Jackson v. etc. R. Co., supra.*

In *Baker v. Bolton*, 1 Camp. 493, Lord Ellenborough ruled that the husband might recover for distress of mind and loss of society from the moment of the injury to his wife up to the time of her death, but that in a civil court the death of a human being could not be complained of as an injury; and the damages to the plaintiff because of the injury to his wife must stop with the period of her existence.

⁷ *Jackson v. R. Co., Sorenson v. Balaban, supra.*

⁸ *Stevenson v. Ritter L. Co.*, 108 Va. 575, 18 L.R.A.(N.S.) 316; *Edgar v. Castello*, 14 S. C. 20, 37 Am. Rep. 719; *Harris v. Kentucky L. Co. (Ky.)*, 74 S. W. 94.

⁹ *Jackson v. Watson* (1909), 2 K. B. 193. Compare *Sherlag v. Kelley, supra.*

¹⁰ *Philby v. Northern Pac. R. Co.*, 46 Wash. 173, 9 L.R.A.(N.S.) 1193, 123 Am. St. 926, following *Worley v. R. Co., supra*; *Davis v. Railway Co.*, 53 Ark. 117, 7 L.R.A. 283.

which are to be appropriated as is just for the benefit of those who, in ordinary cases, would be the greatest pecuniary sufferers.¹¹ Because death is the fact which gives the right of action the damages recoverable are to be measured by the law in force when that event occurred, and not that in effect when the injury which resulted in death was sustained.¹²

Courts of admiralty give effect to such statutes when they are operative in the territory in which life was lost,¹³ and this may be done in proceedings by the owner of the vessel which was the cause of the death for a limitation of his liability under the federal statute.¹⁴ In such cases the recovery will not be limited according to the maritime law, nor by the seaman's contract with his employer, nor by the Harter act, nor by the negligence of the vessel on which the deceased was employed,¹⁵ but by the statutes or decisions of the highest court of the state to which the vessels belonged; the amounts awarded by juries in particular cases are not to be considered as binding precedents.¹⁶

§1260. Nature of the statutory action. By statute in some states the right of action of the injured party survives for all damages which he was entitled to recover; it is preserved notwithstanding his death. But in an action which so survives, any damages which resulted from the death are not recoverable.¹⁷ Such legislation and the rights accruing thereunder

¹¹ Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co., 25 Conn. 275, 65 Am. Dec. 571.

¹² Weber v. Third Ave. R. Co., 12 App. Div. (N. Y.) 512; Keeley v. Great Northern R. Co., 139 Wis. 448.

¹³ The Harrisburg, 119 U. S. 199, 30 L. ed. 358; State v. Hamburg-Am. S. P. Co., 190 Fed. 240; In re Clyde S. S. Co., 134 Fed. 95; Trauffer v. Detroit & C. N. Co., 181 Fed. 256, 4 N. C. C. A. 977; Cornell S. Co. v. Fallon, 102 C. C. A. 345, 179 Fed. 293.

¹⁴ The Northern Queen, 117 Fed. 906; The Hamilton, 77 O. C. A. 150, 146 Fed. 724.

¹⁵ Same cases, 207 U. S. 398, 52 L. ed. 264, aff'g 146 Fed. 724.

¹⁶ The Saginaw and The Hamilton, 139 Fed. 906; Quinette v. Bisso, 69 C. C. A. 503, 136 Fed. 825, 5 L.R.A.(N.S.) 303.

In case of the death of a seaman the ground or extent of his recovery in tort, had he lived, does not prevent the recovery of full indemnity under the statute of the state upon which the action is brought. Cornell S. S. Co. v. Fallon, 102 C. C. A. 345, 179 Fed. 293.

¹⁷ Melzner v. Northern Pac. R. Co., 46 Mont. 162; Stewart v. United E. L. & P. Co., 104 Md. 332, 8 L.R.A.(N.S.) 384, 118 Am. St.

are therefore not germane to the subject of this chapter.¹⁸ In some states provision is made by statute for the survival of the action which accrued to the deceased for all the damages he was entitled to recover; and also damages resulting to the parties for whose use and benefit the action survives from the death, consequent upon the injuries received.¹⁹ The latter dam-

410; *Wetherell v. Chicago City R. Co.*, 104 Ill. App. 357; *Kyes v. Valley Tel. Co.*, 132 Mich. 281, 13 Am. Neg. Rep. 340; *Hendricks v. American Exp. Co.*, 138 Ky. 704, 32 L.R.A.(N.S.) 867; *Bellamy v. Whitsell*, 123 Mo. App. 610. See *Louisville & N. R. Co. v. Simrall*, 127 Ky. 55.

Under other statutes the right of action for a personal injury survives the death of the person injured, and the recovery by his personal representative is the value of the life of the decedent to him. *Kling v. Torello*, 87 Conn. 301, 46 L.R.A.(N.S.) 930.

¹⁸ *Gately v. Taylor*, 211 Mass. 60, 39 L.R.A.(N.S.) 472. See *Love v. Detroit, etc. R. Co.*, 170 Mich. 1; *Goodsell v. Hartford, etc. R. Co.*, 33 Conn. 51; *Olivier v. Houghton County St. R. Co.*, 134 Mich. 367.

Where an action for death was pending at the time a statute was enacted providing for the recovery for the conscious suffering of the decedent and the pleading in the original action was amended after the enactment of the statute a limitation in the original death statute as to the amount of the recovery had no effect upon the new cause of action, the recovery under which was governed by common-law rules. *Gilpatrick v. Cotting* 214 Mass. 426.

¹⁹ *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio 395, 14 L.R.A.(N.S.) 893. See *Wabash S. D. Co.*

v. Black (Tenn.), 61 C. C. A. 639, 126 Fed. 721; *St. Louis, etc. R. Co. v. Stamps*, 84 Ark. 241; Code of Tennessee, §§ 2291, 2292, Act of March, 1883; *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291, 9 Am. Neg. Cas. 491; *Louisville, etc. R. Co. v. Burke*, 6 Cold. 45; *Nashville, etc. R. Co. v. Prince*, 2 Heisk. 580; *Holton v. Daly*, 106 Ill. 131; *Merrihew v. Chicago City R. Co.*, 92 Ill. App. 346.

In Tennessee all the damages resulting from the death of a wife and mother, including those sustained by her infant child, are to be recovered by the husband as administrator. *Railroad v. Johnson*, 97 Tenn. 667, 34 L.R.A. 442.

In Michigan the right of action given by statute to the personal representatives of the deceased for the personal injury resulting from his negligent killing and that which survives under another statute, for negligent injuries to persons, are not separate and distinct causes of action, nor is the remedy under the latter statute excluded because death ultimately ensued from the injury. *Dolson v. Lake Shore, etc. R. Co.*, 128 Mich. 444. Compare *Hurst v. Detroit City R. Co.*, 84 Mich. 539.

The opposing view is held in Colorado. *Kelley v. Union Pac. R. Co.*, 16 Colo. 455, 9 Am. Neg. Cas. 132.

In Kentucky one statute provides for the survival of actions for per-

ages are those generally provided for in statutes which are the subject of this chapter. In this country they are chiefly modeled after the English statute commonly called Lord Campbell's

sonal injuries and another for the recovery of damages resulting from death when it is caused by any wrongful act or negligence. Under the former there can be no recovery where the injury causes immediate death, for then there was in the decedent no right of action to survive. It is otherwise if there was an appreciable interval. It is held in that state, where the personal injury causes death but not instantly, that there is an election to sue under either provision; but recovery under one bars recovery under the other. *Hansford v. Payne*, 11 Bush 380; *Connor v. Paul*, 12 id. 144.

In Illinois, under similar provisions, it is held that an action which survives is for a personal injury which does not cause death; that an action given for recovery of damages which result from death is the only action for the negligence or fault which causes it. *Holton v. Daly*, 106 Ill. 131.

The same is held in Kansas: *McCarthy v. Railroad Co.*, 18 Kan. 46, 26 Am. Rep. 742; *Eureka v. Merrifield*, 53 Kan. 794; *Martin v. Missouri Pac. R. Co.*, 58 Kan. 475, 3 Am. Neg. Rep. 165. See *Hulbert v. Topeka*, 34 Fed. 510. And in Rhode Island: *Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L.R.A. 797. See *Southern Bell Tel. & T. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694, where the question is discussed in its bearings upon another issue.

In Maine the damages resulting from death are allowed only in cases where the death was instantaneous; and where the injured per-

son does not die immediately the action survives and no other remedy is needed. *State v. Maine Cent. R. Co.*, 60 Me. 490, 15 Am. Neg. Cas. 294; *State v. Grand Trunk R.*, 61 Me. 114, 14 Am. Rep. 552, 15 Am. Neg. Cas. 294.

The same rule has been applied to ch. 124, laws of 1891. *Sawyer v. Perry*, 88 Me. 42, 15 Am. Neg. Cas. 291.

The language of the statutes where survival of actions for personal injury is provided for and there is also provision for recovery of damages resulting from death is broad enough to entitle the personal representative to recover the damages which accrue to the decedent and also those which result from the death ensuing from the same injury. As appears by the foregoing cases, there is a reluctance in the states from which those citations are taken to allow damages in this broad sense, or to regard those statutes as affording a right to cumulative damages. The actions thus provided for give damages mostly of a different nature, and it would seem quite consistent with the policy of the statutes, if not necessary to their natural force and operation, to allow both classes of damages. To hold otherwise, if death ensues from the personal injury for which the injured person has a right of action, is unwarrantably to restrict the operation of the statute. There is nothing on the face of these statutes to make one operate to repeal the other or to require an election under which the action should be brought, with

Act, the text of which will be found in a note.²⁰ There has been some diversity of expression as to the limits of the cause of

the effect of renouncing the right given by the other.

The view expressed in this note is in accord with *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693; *Davis v. Railway*, 53 Ark. 117, 7 L.R.A. 283; *Brown v. Chicago*, etc. R. Co., 102 Wis. 137, 44 L.R.A. 579; *Hurst v. Detroit City R. Co.*, 84 Mich. 539 (but see *Dolson v. Lake Shore*, etc. R. Co., *supra*); *Leggott v. Great Northern R. Co.*, 1 Q. B. Div. 599; *Robinson v. Canadian Pac. R. Co.*, [1892] App. Cas. 481; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294 (compare the last case with *Legg v. Britton*, 64 Vt. 652; *Hedrick v. Ilwaco R. & N. Co.*, 4 Wash. 400; *Connors v. Burlington*, etc. R. Co., 71 Iowa 490, 60 Am. Rep. 814; *Putnam v. Southern Pac. R. Co.*, 21 Ore. 230; *Belding v. Black Hills*, etc. R. Co., 3 S. D. 369; *Hamilton v. Morgan's L. & T. R. & S. S. Co.*, 42 La. Ann. 824. See *Mulchahey v. Washburn C. W. Co.*, 145 Mass. 281, 1 Am. St. 458, 15 Am. Neg. Cas. 621.

Under the Pennsylvania statute providing for the survival of actions in negligence cases where the plaintiff dies, recovery may be had, not only for the mental and physical suffering up to the time of death and diminution of earning power during the period he would probably have lived, but also for the value of his life. *Maher v. Philadelphia T. Co.*, 181 Pa. 391. By the value of the life is meant, not its value to others, but the value of the advantages of which the injured party was deprived because of the diminution or loss of earning power. No damages can be recovered for the loss which other

persons sustained by reason of the death. *McCafferty v. Pennsylvania R. Co.*, 193 Pa. 339, 6 Am. Neg. Rep. 693, 74 Am. St. 690.

Under the statutes of Washington a father may maintain an action to recover for the death of his child notwithstanding the administrator of the child's estate may have recovered against the same defendant for causing the child's death. *Hedrick v. Ilwaco R. & N. Co.*, 4 Wash. 400.

A recovery by the personal representative for the death of the intestate while being carried under a contract does not affect the representative's right to recover for damage to the intestate's personal estate caused during his lifetime by medical expenses and loss from inability to attend to business. *Daly v. Dublin*, etc. R. Co., 30 L. R. Ire. 514, following *Bradshaw v. Lancashire & Y. N. Co.*, L. R. 10 C. P. 189.

²⁰ 9 and 10 Vict., ch. 93. It recites that no action at law is now maintainable against a person who by his wrongful act, neglect or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him; and enacts that whensoever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had

action thus created.²¹ A personal injury by the defendant's wrongful act, neglect or default is the basis of his liability, but only because it produces death, and the liability is only for the damages which result from the death to those for whose use and benefit the statutory action is given. It is a new cause of action because there is an element in it additional to that which constituted the cause of action in favor of the person injured, viz.: death must ensue as a consequence of the injury to him.²² It

not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

In so far as the state statutes cover the same field as is covered by the federal employer's liability act regulating the liability of interstate railroads for the death or injury of their employees while engaged in interstate commerce they were superseded by the federal act. *Mondou v. New York, etc. R. Co.*, 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44.

²¹ *Blake v. Midland R. Co.*, 18 Q. B. 93; *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555; *Barnett v. Lucas*, Irish Rep. 6 C. L. 247; *Pym v. Great Northern R. Co.*, 2 B. & S. 759; *Leggott v. Great Northern R. Co.*, 1 Q. B. Div. 599; *Safford v. Drew*, 3 Duer 627; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Holton v. Daly*, 106 Ill. 131.

²² *Louisville & N. R. Co. v. Simrall*, 127 Ky. 55; *Anderson v. Wetter*, 103 Me. 257, 15 L.R.A. (N.S.) 1003; (*Perkins v. Oxford P. Co.* 104 Me. 109, 21 Am. Neg. Rep. 116); *Stewart v. United E. L. & P. Co.*, 104 Md. 332, 8 L.R.A. (N.S.) 384, 118 Am. St. 410; *Bolick v. Railroad*, 138 N. C. 370; *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio 395, 14 L.R.A. (N.S.) 893; *Osteen v.*

Southern R., 76 S. C. 368; *Andrews v. Hartford, etc. R. Co.*, 34 Conn. 57; *In re Mayo's Est.*, 60 S. C. 401, 54 L.R.A. 660; *Weber v. Third Ave. R. Co.*, 12 App. Div. (N. Y.) 512; *Perham v. Portland Elec. Co.*, 33 Ore. 451, 40 L.R.A. 799, 73 Am. St. 730; *The Oregon*, 73 Fed. 846; *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 59; *Holland v. Brown*, 35 Fed. 43; *Hurlbert v. Topeka*, 34 id. 510; *Martin v. Missouri Pac. R. Co.*, 58 Kan. 475, 3 Am. Neg. Rep. 165; *Northern Pac. R. Co. v. Adams*, 64 C. C. A. 196, 13 Am. Neg. Rep. 579, 116 Fed. 324; *Burns v. Grand Rapids R. Co.*, 113 Ind. 169; *Lange v. Schoettler*, 115 Cal. 388; *Burk v. Arcata & M. R. R. Co.*, 125 Cal. 364, 73 Am. St. 52; *Cooper v. Shore E. Co.*, 63 N. J. L. 558; *Maney v. Chicago, etc. R. Co.*, 49 Ill. App. 105; *McKay v. New England D. Co.*, 92 Me. 454; *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 153, 8 Am. Neg. Rep. 490, 51 L.R.A. 235. See *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131.

No new right is given by the Missouri statute; the right of action is preserved and transmitted. *Hennessey v. Bavarian B. Co.*, 145 Mo. 104, 112, 68 Am. St. 554, 41 L.R.A. 385; *Brink v. Wabash R. Co.*, 160 Mo. 87, 53 L.R.A. 811.

In Vermont the statute, which is nearly a copy of Lord Campbell's Act, does not create a new and ad-

is a different cause of action also, because only the damages which ensue from the death are recoverable.²³ It is essential that the personal injury which causes the death appear to have proceeded from the wrongful act, neglect or default of the defendant.²⁴ Any evidence, therefore, which would be admissible in an action by the injured person to controvert that charge is equally admissible as a defense to the statutory action.²⁵ And

ditional cause of action in favor of the beneficiaries, but provides for the recovery of a new class of damages if a right of action would have existed in the deceased but for his death. *Legg v. Britton*, 64 Vt. 652

²³ *Thomas v. Chicago & N. W. R. Co.*, 202 Fed. 766; *Garrett v. Louisville & N. R. Co.*, 197 Fed. 715; *Almquist v. Wilcox*, 115 Minn. 37; *Ingersoll v. Detroit, etc. R. Co.*, 163 Mich. 268, 32 L.R.A.(N.S.) 362; *McLaughlin v. Hebron Mfg. Co.*, 171 Fed. 269; *Chesapeake & O. R. Co. v. Banks*, 142 Ky. 746; *Texas & N. O. R. Co. v. Walker*, 58 Tex. Civ. App. 615.

²⁴ *Mageau v. Great Northern R. Co.*, 103 Minn. 290, 15 L.R.A.(N.S.) 511.

The injury caused by the defendant need not be the only cause of death; if it be established that such injury set in motion other causes, which produced the disease and the death, and which, without the injury, would not have produced death, an action lies. *Weber v. Third Ave. R. Co.*, 12 App. Div. (N. Y.) 512; *Purcell v. Lauer*, 14 App. Div. (N. Y.) 33, 2 Am. Neg. Rep. 57. See *Hoey v. Metropolitan St. R. Co.*, 70 App. Div. (N. Y.) 60.

²⁵ *Sullivan-S. L. Co. v. Watson* (Tex.), 155 S. W. 179; *Smith v. National C. & I. Co.*, 135 Ky. 671; *Larocque v. Conheim*, 42 N. Y. Misc. 613; *Brammer v. Norfolk & W. R. Co.*, 107 Va. 206; *Pendleton v.*

Richmond, etc. R. Co., 104 Va. 813; *Kelly v. Hendrie*, 26 Mich. 255; *Michigan Cent. R. Co. v. Campau*, 35 id. 468; *Bresnahan v. Michigan Cent. R. Co.*, 49 Mich. 410, 16 Am. Neg. Cas. 146; *Tucker v. Chaplin*, 2 C. & K. 730; *Willets v. Buffalo, etc. R. Co.*, 14 Barb. 588.

In *McCue v. Klein*, 60 Tex. 168, 48 Am. Rep. 260, it was held killing a man by inducing him to drink a pint of whisky was actionable.

If the person entitled to the benefit of the recovery contributed to cause the death it will defeat the action. *Williams v. Railroad Co.*, 60 Tex. 205, 15 Am. Neg. Rep. 701; *Pittsburgh, etc. R. Co. v. Vining*, 27 Ind. 513, 92 Am. Dec. 269; *Baltimore, etc. R. Co. v. State*, 30 Md. 47; *Railway Co. v. Snyder*, 24 Ohio St. 670. In the latter case the contributory negligence of the father in the exposure of his infant child to the injury which caused its death was fatal to his action, though it would not have affected the action if the infant had survived.

Under the Ohio statute the damages are to be assessed with reference to the injury sustained by each beneficiary; such beneficiaries as contributed to the death of the decedent by negligence cannot recover; those who did not so contribute are not affected by the contributory negligence of the others. *Wolf v. Lake Erie & W. R. Co.*, 55 Ohio St.

it has been held that any subsequent matter of discharge, arising in the life-time and by the act of the injured party, sufficient to satisfy, bar or release his action will be fatal to the new action by his personal representatives if death ensue.²⁶ In Kentucky under a particular statute a new cause of action arises in which neither the deceased nor his administrator has any interest; hence the settlement of an action brought by him to recover for his injuries does not bar the widow's right to recover for his subsequent death.²⁷ The death of a person entitled to sue pending the suit neither abates the action in the common-law sense, nor is the cause of action to be compensated for discharged;²⁸ but in such a case the damages which may be recovered will be limited in duration and extent to the life-time of such person.²⁹ It is otherwise under some statutes.³⁰ But one action can be maintained,³¹ and that must be by the person authorized to sue.³² An action brought by the widow of the decedent abates after

517, 12 Am. Neg. Cas. 508, 12 Am. Neg. Rep. 162, 36 L.R.A. 812.

²⁶ *Mehegan v. Boyne City*, G. & A. R. Co., 178 Mich. 694; *Mooney v. Chicago*, 239 Ill. 414; *Louisville R. Co. v. Raymond*, 135 Ky. 738, 27 L.R.A.(N.S.) 176; *Strode v. St. Louis T. Co.*, 197 Mo. 616; *Hodge v. Rutland R. Co.*, 112 App. Div. (N. Y.) 142; *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555; *Dibble v. New York & E. R. Co.*, 24 Barb. 183; *Hecht v. Ohio & M. R. Co.*, 132 Ind. 507; *Southern Bell Tel. & T. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694 (two judges dissenting).

A settlement with the decedent held a bar. *Whitford v. Panama R. Co.*, 23 N. Y. 484, per Comstock, J., dissenting. His release given the same effect. *Holton v. Daley*, 106 Ill. 131. So a recovery by him in his lifetime and the judgment paid. *Littlewood v. Mayor*, 89 N. Y. 24, 42 Am. Rep. 271.

If the injured person began a suit which his administrator prose-

cuted to judgment after his death such judgment bars a second suit for the benefit of the widow although the recovery was solely for the injuries to the deceased in his lifetime. *Legg v. Britton*, 64 Vt. 652.

²⁷ *Donahue v. Drexler*, 82 Ky. 157, 56 Am. Rep. 886. See *Louisville R. Co. v. Raymond*, 135 Ky. 738, 27 L.R.A.(N.S.) 176.

²⁸ *Cooper v. Shore Elec. Co.*, 63 N. J. L. 558; *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 8 Am. Neg. Rep. 490, 51 L.R.A. 235.

²⁹ *Cooper v. Shore Elec. Co.*, *supra*.

³⁰ *Gilkerson v. Missouri Pac. R. Co.*, 222 Mo. 173, 24 L.R.A.(N.S.) 844, ruled under the statute as it was prior to 1905.

³¹ *Riggs v. Northern Pac. R. Co.*, 60 Wash. 292; *McFadden v. St. Paul Coal Co.*, 183 Ill. App. 36, *aff'd* 263 Ill. 441.

³² *Billingsley v. St. Louis, etc. R. Co.*, 84 Ark. 617, 120 Am. St. 95.

her death if she is not survived by any person dependent upon the decedent for support.³³ The cause of action does not survive the death of the wrong-doer where that occurs before the death of the person injured.³⁴ In the absence of any act done by the deceased to bar a suit by him if he had survived the right of action is a vested right in favor of those who are authorized to sue, and cannot be affected by the payment of money, after the death of the person injured, to one who was his beneficiary in a relief fund established by the defendant.³⁵ A compromise made by the widow of the decedent in good faith is binding upon their children though made without the consent of their guardian, they not being proper parties though required to be named in the pleading.³⁶

§ 1261. **Diversities as to beneficiaries; rights of non-resident aliens.** The statutes under consideration do not provide uniformly for the same distribution of the fruits of recoveries. The most noticeable difference and the one which affects greatly the elements of damage is that between statutes which provide that the damages shall be distributed to the widow, husband and near kin of the deceased and those which provide that they shall be part of his estate. Under the former the beneficiaries may recover the amount of loss resulting to them from the death; under the latter no such inquiries are relevant, but the question is how much has his estate suffered by his death. The subject of damages under statutes in the first category will be considered, after remarking that it has been decided in Wisconsin, Pennsylvania, Washington and Colorado that the general language employed in the statutes thereof does not include non-resident aliens as beneficiaries where the deceased was instantly killed or died without conscious pain.³⁷ But residents of a sister state are not non-resident aliens, neither is a widow of

³³ Dillier v. Cleveland, etc. R. Co.,
³⁴ Ind. App. 52.

³⁴ Beavers v. Putnam, 110 Va.
713.

³⁵ Neill v. Wilson, 146 N. C. 242;
McKeering v. Pennsylvania R. Co.,
65 N. J. L. 57, 8 Am. Neg. Rep. 486,
and cases cited.

³⁶ Shambach v. Middlecreek E.
Co., 45 Pa. Super. Ct. 300.

³⁷ McMillan v. Spider Lake S. &
L. Co., 115 Wis. 332, 60 L.R.A. 589;
Roberts v. Great Northern R. Co.,
(Wash.) 161 Fed. 239; Patek v.
American S. & R. Co., (Colo.) 21
L.R.A. (N.S.) 273, 83 C. C. A. 284,

a resident who has taken the first step to become a citizen though she lives in a foreign country, it being her purpose to join her husband in the state in which he resided up to the time of his decease.³⁸ A resident is not barred of his right of action though it is dependent upon the alienship of other non-residents relatives of the deceased.³⁹ According to the great weight of authority non-resident aliens are not barred of the benefits given by statutes of this nature.⁴⁰

§ 1262. Only pecuniary losses compensated in England and Canada. There is no dissent in the English decisions made since 1852 from the rule that damages cannot be awarded for mental suffering or loss of society, but must be restricted to pecuniary loss. The language of Lord Campbell's act on this point is: "The jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively for whom or for whose benefit such action shall be brought." Its title is "an act for compensating the families of persons killed." It also provides that the amount

154 Fed. 190; *Maiorano v. Baltimore & O. R. Co.*, 216 Pa. 402, 21 L.R.A.(N.S.) 271, 116 Am. St. 778 (right not given by treaty with Italy).

³⁸ *Laconte v. Kenosha*, 149 Wis. 343.

³⁹ *Pries v. Ashland L., P. & St. R. Co.*, 143 Wis. 606.

⁴⁰ *Atchison, etc. R. Co. v. Fajardo*, 74 Kan. 314, 6 L.R.A.(N.S.) 681; *Kellyville C. Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. 193; *Romano v. Capital City B. & P. Co.*, 125 Iowa 591, 68 L.R.A. 132, 106 Am. St. 323; *Low Moor I. Co. v. La Bianca*, 106 Va. 83; *Anastaskas v. International C. Co.*, 51 Wash. 119, 21 L.R.A.(N.S.) 267, 130 Am. St. 1089; *Saveljich v. Lytle L. & M. Co.*, 97 C. C. A. 443, 173 Fed. 277 (it is said in a note written by the judge that sixteen states and one territory hold in opposition to the Wisconsin and Pennsylvania

rule, citing the cases); *Baltimore & O. R. Co. v. Baldwin*, (Ohio) 75 C. C. A. 211, 144 Fed. 53; *Hirschkovitz v. Pennsylvania R. Co.*, 138 Fed. 438; *Kaneko v. Atchison, etc. R. Co.*, (Cal.) 164 Fed. 262; *Davidson v. Hill* (1901), 2 K. B. 606, dissenting from *Adam v. British, etc. S. S. Co.* (1898), 2 Q. B. 430; *Pittsburgh, etc. R. Co. v. Naylor*, 73 Ohio 115, 3 L.R.A.(N.S.) 473, 19 Am. Neg. Rep. 487, 112 Am. St. 701; *Trotta v. Johnson*, 121 Ky. 827; *Young v. Louisville & N. R. Co.*, 121 Ky. 483; *Gaska v. American C. & F. Co.*, 127 Mo. App. 169; *Cetofonte v. Camden C. Co.*, 78 N. J. L. 662, 27 L.R.A.(N.S.) 258; *Alfson v. Bush*, 182 N. Y. 393, 19 Am. Neg. Rep. 35, 108 Am. St. 815; *Renlund v. Commodore M. Co.*, 89 Minn. 41; *McGovern v. Philadelphia & R. Ry. Co.*, 235 U. S. 389, 59 L. ed. 283, 8 N. C. C. A. 67.

recovered shall be divided amongst the parties mentioned in it in such shares as the jury by their verdict shall find and direct. These provisions in it and the difficulty of apportioning the damages for *solatium* materially influenced the court in reaching the conclusion that only pecuniary losses are within the intent of the law.⁴¹ The Canadian statute is not unlike the English. The courts of Ontario have differed greatly as to the signification of the word "injury." The majority of the judges of the queen's bench division held that the damages resulting from the loss of a wife or mother, no matter how excellent her qualities or how faithful she might be in discharging her duties and promoting the material and moral condition and prospects of her children, are purely sentimental and not of a sufficiently pecuniary character to support an action. A majority of the judges of the court of appeal differed from this view and held that what is meant by pecuniary loss in all the decided cases in which the expression has been used is the loss of some benefit or advantage which is capable of being estimated in money as distinguished from mere sentimental losses. A majority of the supreme court of the Dominion of Canada concurred in this view.⁴² The same court holds that no recovery can be had for *solatium* merely. This is the rule under the code of Lower Canada,⁴³ and in New Zealand.⁴⁴ Neither at common law nor under Lord Campbell's act can a parent recover the cost of funeral expenses incurred in the burial of a minor child who was residing at home when killed.⁴⁵

§ 1263. Same subject; rule in the United States; exemplary damages; interest. In some states the statutes provide in terms

⁴¹ *Black v. Midland R. Co.*, 18 Q. B. 93.

⁴² *St. Lawrence, etc. R. v. Lett*, 11 Can. Sup. Ct. 422; *Lett v. St. Lawrence, etc. R.*, 11 Ont. App. 1, 1 Ont. 545; *Ronson v. Canadian Pac. R. Co.*, 18 Ont. L. R. 337.

⁴³ *Canadian Pac. R. Co. v. Robinson*, 14 Can. Sup. Ct. 105.

It is said in *Canadian Pac. R. Co. v. Lachance*, 42 Can. Sup. Ct. 205, that the ground upon which

that case was decided was to some extent shaken by the judgment of the privy council in *Robinson v. Canadian Pac. R. Co.*, [1892] App. Cas. 481.

⁴⁴ *Greymouth-Point Elizabeth R. & C. Co. v. McIvor*, 16 New Zeal. L. R. 258.

⁴⁵ *Clark v. London G. O. Co.*, [1906] 2 K. B. 648; *Toronto R. Co. v. Mulvaney*, 38 Can. Sup. Ct. 327.

for the recovery of damages for a pecuniary injury, and in others the word pecuniary is not used, but the construction given is the same, restricting the damages to such injury. The theory of the statutes is that those for whom compensation is provided have a pecuniary interest in the life of the person killed, and consequently the amount of recovery is limited to the value of that interest.⁴⁶ The rule confining recoveries to pecuniary

⁴⁶ *Delaski v. Northwestern I. Co.*, 70 Wash. 143; *Bond v. United R.*, 159 Cal. 270; *Fowler v. Chicago, etc. R. Co.*, 234 Ill. 619; *Pittsburg, etc. R. Co. v. Gates*, 137 Ill. App. 309; *Illinois Cent. R. Co. v. Whiteaker*, 122 id. 333; *Pittsburgh, etc. R. Co. v. Reed*, 44 Ind. App. 635; *Falender v. Blackwell*, 39 Ind. App. 121; *McCarthy v. Olafin*, 99 Me. 290; *Stewart v. United E. L. & P. Co.*, 104 Md. 332, 8 L.R.A. (N.S.) 384, 118 Am. St. 410; *McDonald v. Champion I. & S. Co.*, 140 Mich. 401; *King v. Ann Arbor R. Co.*, 144 Mich. 65; *Dando v. Home Tel. Co.*, 126 Mo. App. 242; *Calcaterra v. Iovaldi*, 123 Mo. App. 347 (it is said that a remark to the contrary in *Sharp v. National B. Co.*, 179 Mo. 553, was *obiter*), a view expressed also in the case next cited; *Marshall v. Consolidated J. M. Co.*, 119 Mo. App. 270; *Christensen v. Floriston P. & P. Co.*, 29 Nev. 552; *McCabe v. Narragansett E. L. Co.*, 26 R. I. 427, 17 Am. Neg. Rep. 355; *Missouri, etc. R. Co. v. Wallace*, 53 Tex. Civ. App. 127; *Ft. Worth, etc. R. Co. v. Linthicum*, 33 Tex. Civ. App. 375; *Boucher v. Wisconsin Cent. R. Co.*, 141 Wis. 160; *Hamann v. Milwaukee B. Co.*, 136 Wis. 39; *Austin v. Metropolitan St. R. Co.*, 108 App. Div. (N. Y.) 249; *Conover v. Harrisburg & S. C. Co.*, 161 Ill. App. 74; *Pittsburgh, etc. R. Co. v. Brown*, 178 Ind. 11; *Galveston, etc. R. Co. v. Salisbury*

(Tex. Civ. App.), 143 S. W. 252; *Oakes v. Maine Cent. R. Co.*, 95 Me. 103; *Geiger v. Worthen*, 66 N. J. L. 576; *In re California N. & I. Co.*, 110 Fed. 670; *Kesler v. Smith*, 66 N. C. 154; *Telfer v. Northern R. Co.*, 30 N. J. L. 188, 12 Am. Neg. Cas. 275; *Quin v. Moore*, 15 N. Y. 434; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Chicago, etc. R. Co. v. Morris*, 26 Ill. 400; *Conant v. Griffin*, 48 id. 412; *Illinois Cent. R. Co. v. Weldon*, 52 id. 295; *Chicago v. Scholten*, 75 id. 468; *Baltimore, etc. R. Co. v. State*, 24 Md. 271, 33 id. 542; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151, 16 Am. Neg. Cas. 643; *Kelley v. Chicago, etc. R. Co.*, 50 Wis. 381, 17 Am. Neg. Cas. 905; *Regan v. Same*, 51 Wis. 599; *McKeigue v. Janesville*, 68 Wis. 50; *Barley v. Chicago, etc. R. Co.*, 4 Biss. 430; *Murphy v. New York, etc. R. Co.*, 88 N. Y. 445, 5 Am. Neg. Cas. 238; *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa 280, 87 Am. Dec. 391; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *James v. Christy*, 18 Mo. 162; *Owen v. Brockschmidt*, 54 Mo. 285; *Porter v. Hannibal, etc. R. Co.*, 71 Mo. 66, 36 Am. Rep. 454; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. 526, 12 Am. Neg. Cas. 548; *Same v. Butler*, 57 Pa. 335, 10 Am. Neg. Cas. 210; *Huntingdon, etc. R. Co. v. Decker*, 84 Pa. 419; *Catawissa R. Co. v. Armstrong*, 52 Pa. 282; *Pennsylvania R. Co. v. Bantom*, 54

losses is not applied in a strict sense. "When we consider," says Fullerton, "the defect which the statute was designed to remedy, it is taking too narrow a view of the matter to say that the word *pecuniary* was used in so limited a sense as to embrace only losses of money."⁴⁷ "A liberal scope was designedly left for the action of the jury; they are to give such damages as they shall deem a fair and just compensation with reference to the pecuniary injury resulting from such death; they are not tied down to any precise rule. Within the limit of the statute as to amount and the species of injury sustained the matter is to be submitted to their sound judgment and discretion. They must be satisfied that pecuniary injury resulted. If so satisfied they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied from the history of the family or the intrinsic probabilities of the case that they were sustained by the loss of bodily

Pa. 495; Nashville R. Co. v. Stevens, 9 Heisk. 12; St. Louis, etc. R. Co. v. Rawley, 90 Ill. App. 653; McKay v. New England D. Co., 92 Me. 454; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 13 Am. Neg. Cas. 60; James v. Richmond & D. R. Co., 92 Ala. 231; Orgall v. Chicago, etc. R. Co., 46 Neb. 4; Chicago, etc. R. Co. v. Young, 58 Neb. 678; May v. West Jersey & S. R. Co., 62 N. J. L. 67, 5 Am. Neg. Rep. 417; Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10, 6 Am. Neg. Rep. 179; Gulf, etc. R. Co. v. Finley, 11 Tex. Civ. App. 64; Lehigh I. Co. v. Rupp, 100 Pa. 95; Pennsylvania Co. v. Lilly, 73 Ind. 252; Klepsch v. Donald, 4 Wash. 436, 31 Am. St. 936; Lange v. Schoettler, 115 Cal. 388; Schmidt v. Menasha W. Co., 99 Wis. 300; Denver, etc. R. Co. v. Spencer, 25 Colo. 9; Malott v. Shimer, 153 Ind. 35, 6 Am. Neg. Rep. 263.

Some statutes fix the sum which

may be recovered regardless of the damage sustained. Gilkeson v. Missouri Pac. R. Co., 222 Mo. 173, 24 L.R.A.(N.S.) 844 (under § 2864, R. S. 1899); Casey v. St. Louis T. Co., 116 Mo. App. 235; King v. St. Louis, etc. R. Co., 130 Mo. App. 368; Anderson v. Missouri Pac. R. Co., 196 Mo. 442, 113 Am. St. 748.

In South Carolina pecuniary loss need not, but may, be shown. Barksdale v. Seaboard A. L. R., 76 S. C. 183.

⁴⁷ McIntyre v. New York Cent. R. Co., 37 N. Y. 295, 5 Am. Neg. Cas. 97; Tilley v. Hudson River R. Co., 24 id. 471; Pennsylvania R. Co. v. Keller, 67 Pa. 300; Chicago, etc. R. Co. v. Porterfield, 19 Tex. Civ. App. 225, 4 Am. Neg. Rep. 461; Sternfels v. Metropolitan St. R. Co., 73 App. Div. (N. Y.) 494; Gulf, etc. R. Co. v. Johnson, 1 Tex. Civ. App. 103. But see Walker v. Lake Shore etc. R. Co., 104 Mich. 606, 617, 16 Am. Neg. Cas. 143, 1 Am. Neg.

care or intellectual culture, or moral training which the mother had before supplied, they are at liberty to allow for it.”⁴⁸

Rep. 267, 111 Mich. 518; Ewen v. Chicago & N. R. Co., 38 Wis. 613, 12 Am. Neg. Cas. 658.

⁴⁸ Gentry v. Wabash R. Co., 172 Mo. App. 638; Trieber v. New York, etc. R. Co., 149 App. Div. (N. Y.) 804; Michigan Cent. R. Co. v. Vreeland, *infra*; Tilley v. Hudson River R. Co., 29 N. Y. 252, 286; Phalen v. Rochester R. Co., 31 App. Div. (N. Y.) 448; Walker v. McNeill, 17 Wash. 582; Baltimore & O. R. Co. v. Taylor, 109 C. C. A. 172, 186 Fed. 828 (W. Va.); Stockton v. Pennsylvania R. Co., 182 Fed. 282; Felt v. Puget Sound E. R., 175 Fed. 477; Duke v. St. Louis, etc. R. Co., 172 Fed. 684; Valente v. Sierra R. Co., 168 Cal. 412; Hale v. San Bernardino Valley T. Co., 156 Cal. 713; Ruppel v. United R., 1 Cal. App. 666, 19 Am. Neg. Rep. 303; quoting the text; Anderson v. Great Northern R. Co., 15 Idaho 513, quoting the text; Cox v. L. & N. R. Co., 137 Ky. 388; Black v. Michigan Cent. R. Co., 146 Mich. 568; Gamache v. Johnson T. F. & M. Co., 116 Mo. App. 596; Batton v. Public Service Co., 75 N. J. L. 857, 18 L.R.A.(N.S.) 640, 127 Am. St. 855; Carter v. West Jersey & S. R. Co., 76 N. J. L. 602, 19 L.R.A.(N.S.) 128; O'Doherty v. Postal Tel.-C. Co., 134 App. Div. (N. Y.) 298; Railway Co. v. Sweet, 57 Ark. 287; International, etc. R. Co. v. McVey, 99 Tex. 28; St. Louis S. R. Co. v. Huey (Tex. Civ. App.), 130 S. W. 1017; Missouri, etc. R. Co. v. Wallace, 53 Tex. Civ. App. 127; San Marcos E. L. & P. Co. v. Compton, 48 Tex. Civ. App. 586; Houston & T. Cent. R. Co. v. Rutland, 45 Tex. Civ. App. 621; Chesapeake & O. R. Co. v. Ghee, 110 Va. 527; Poca-

hontas C. Co. v. Rukas, 104 Va. 278, 20 Am. Neg. Rep. 49; Norfolk & W. R. Co. v. Cheatwood, 103 Va. 356; McKiernan v. Lehmaier, 85 Conn. 111; Missouri, etc. R. Co. v. Hurdle (Tex. Civ. App.), 142 S. W. 992; Cleveland, etc. R. Co. v. Van Laningham, 52 Ind. App. 156.

In an action to recover for the death of a father the condition of the mother's health during her lifetime may be shown. International, etc. R. Co. v. McVey, 46 Tex. Civ. App. 181.

The opinion of the commissioner in Ward v. Dampskibsselskabet Kjoebenhaven, 144 Fed. 524, contains a statement of the sums awarded in several cases and the action of the courts thereon.

In Houston & T. C. Ry. Co. v. Loeffler (Tex. Civ. App.), 51 S. W. 536, the earnings of the deceased and the amount of money turned over to his wife were shown. It was said: The charge intrinches upon the discretion of the jury if they are to look only to the sums of money which would probably have come into the hands of the wife from the earnings of the husband had he not been killed. The jury are to consider all evidence bearing on the subject, including the pecuniary status of the parties, and their reasonable expectations from the labors of the husband; and from all the facts, and from the experience and observation of the jury, determine what sum would be a just compensation to the wife for the pecuniary loss sustained by her in the death of her husband, allowing her nothing for distress and the depreciation of his society.

There is almost entire harmony in denying a recovery for the mental suffering of the beneficiaries of the deceased, or as a *solatium*.⁴⁹ In some states the language of the statutes has

It is said in *Webb v. Denver, etc. R. Co.*, 7 Utah 17, 23. The word "pecuniary" in this connection is not construed in any very strict sense, and the tendency is to still greater liberality, and to include every element of injury that may be deemed to have a pecuniary value, although this value may not be susceptible of positive proof, and can only be vaguely estimated. It may include the loss of nurture, of the intellectual, moral and physical training which a mother only can give to children. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252, 286. It may include the loss of expected services of children who, at the time of their death, are too young to render any service (*Ihl v. Forty-second St., etc. R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450, 12 Am. Neg. Cas. 327), or of children or persons under no legal or moral obligation to render service or support, if the circumstances shown make it probable it will be rendered (*Chicago & N. R. Co. v. Bayfield*, 37 Mich. 205; *Railroad Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591). It may include the loss of the society of a near relative (*Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20, 13 Am. Neg. Cas. 461, and may include damages for the loss of the father by children who are of full age, living away from the home of the deceased and supporting themselves. *Lockwood v. New York, etc. R. Co.*, 98 N. Y. 523.

⁴⁹ *Penoza v. Northern Pac. Ry. Co.*, 215 Fed. 200; *McLaughlin v. United Rys. of San Francisco*, 169 Cal. 494, L.R.A. 1915E 1205; *Suth. Dam. Vol. V.—2.*

Standard Forgings Co. v. Holmstrom, 58 Ind. 306; *Graffam v. Saco Grange, Patrons of Husbandry*, No. 53, 112 Me. 508, L.R.A. 1915C 632; *Arnold v. State*, 163 App. Div. (N. Y.) 253; *Smith v. Chicago, R. I. & P. R. Co.*, 42 Okla. 577; *Big Jack Min. Co. v. Parkinson*, 41 Okla. 125; *Kelly v. City of Higginsville*, 185 Mo. App. 55; *Houston & T. C. R. Co. v. Walker*, — Tex. —, 173 S. W. 208 [rev'g 167 S. W. 199]; *Whitmer v. El Paso, etc. R. Co.*, 201 Fed. 193 (New Mexico); *Cain v. Southern R. Co.*, 199 Fed. 211; *Shields v. Dale*, 168 Ill. App. 362; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417 rev'g 189 Fed. 495; *American R. Co. v. Didrickson*, 227 U. S. 145, 57 L. ed. 456; *St. Louis, etc. R. Co. v. Geer* (Tex. Civ. App.), 149 S. W. 1178; *Felt v. Puget Sound E. R.*, 175 Fed. 282; *Swift v. Johnson*, 1 L.R.A.(N.S.) 1161, 71 C. C. A. 619, 138 Fed. 867; *Kountz v. Toledo, etc. R. Co.*, 189 Fed. 494; *Smith v. Cissell*, 22 App. Cas. (D. C.) 318; *Helena G. Co. v. Rogers*, 98 Ark. 413; *Howey v. New England N. Co.*, 83 Conn. 278; *Glawson v. Southern Bell Tel. & T. Co.*, 9 Ga. App. 450; *Ferreira v. Honolulu R. T. & L. Co.*, 16 Hawaii 615; *Ohio Valley T. Co. v. Wernke*, 42 Ind. App. 326; *Voelker v. Hill O. C. Co.*, 153 Mo. App. 1; *San Marcos E. L. & P. Co. v. Compton*, 48 Tex. Civ. App. 586; *Smith v. Lehigh Valley R. Co.*, 177 N. Y. 379 (it was error to admit in evidence a photograph of the deceased, a handsome woman); *Ballinger v. Rader*, 153 N. C. 488;

been regarded as warranting a recovery for the wounded feelings of the beneficiaries. Under a statute empowering the jury to give "such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought," the wounded feelings of the beneficiaries may be considered in estimating the damages.⁵⁰ Such feelings are

Byrd v. Southern Exp. Co., 139 N. C. 273; Morales v. San Juan L. & T. Co., 4 Porto Rico Fed. 361; (but compare Perianes v. Valdes, *id.* 126); Bremer v. Minneapolis, etc. R. Co., 96 Minn. 469; Brunke v. Missouri & K. Tel. Co., 112 Mo. App. 623 (the statute uses "necessary injury"); Wood v. Omaha, 87 Neb. 213; Johnson County v. Carmen, 71 Neb. 682; Hackney v. Delaware & A. Tel. Co., 69 N. J. L. 335; McCabe v. Narragansett E. L. Co., 26 R. I. 427, 17 Am. Neg. Rep. 355; Gulf, etc. R. Co. v. Farmer, 102 Tex. 235; Texas & N. O. R. Co. v. Walker, 58 Tex. Civ. App. 615; Houston & T. Cent. R. Co. v. Rutland, *supra*; International, etc. R. Co. v. McVey, 46 Tex. Civ. App. 181; Pittsburgh, etc. R. Co. v. Brown, 178 Ind. Redding v. Security Mut. L. Ins. Co. (Mo. App.), 144 S. W. 185; McCleary v. Pittsburgh R. Co., 47 Pa. Super. Ct. 366; Kansas Pac. R. Co. v. Miller, 2 Colo. 465, 466; Illinois Cent. R. Co. v. Benz, 108 Tenn. 670, 58 L.R.A. 690; Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Chicago, etc. R. Co. v. Morris, 26 Ill. 400; Chicago, etc. R. Co. v. Shannon, 43 Ill. 346, 14 Am. Neg. Cas. 368; Illinois Cent. R. Co. v. Weldon, 52 Ill. 290; Holton v. Daly, 106 Ill. 131; Chicago, etc. R. Co. v. Harwood, 80 Ill. 88; Oakes v. Maine Cent. R. Co., 95 Me. 103; Covington

St. R. Co. v. Packer, 9 Bush 455, 15 Am. Rep. 725; Barley v. Chicago, etc. R. Co., 4 Biss. 430; Etherington v. Prospect Park, etc. R. Co., 88 N. Y. 641, 12 Am. Neg. Cas. 327; Freeman v. Railroad, 107 Tenn. 340; North Chicago St. R. Co. v. Brodie, 156 Ill. 317; O'Fallon C. Co. v. Laquet, 89 Ill. App. 13; Commercial Club v. Hilliker, 20 Ind. App. 239; Railroad v. Wyrick, 99 Tenn. 500; Taylor, etc. R. Co. v. Warner, 84 Tex. 122; McGown v. International & G. N. R. Co., 85 Tex. 289, St. Louis, etc. R. Co. v. Freeman, 36 Ark. 41, 11 Am. Neg. Cas. 147, 12 Am. Neg. Rep. 479; Kake v. Horton, 2 Hawaii 209; Donaldson v. Mississippi & M. R. Co., 18 Iowa 280, 87 Am. Dec. 391; Southwestern R. Co. v. Paulk, 24 Ga. 356, 366; Hyatt v. Adams, 16 Mich. 180; Webb v. Denver, etc. R. Co., 7 Utah, 17, 23; Lazell v. Newfane, 70 Vt. 440; Walker v. McNeill, 17 Wash. 582; Hunt v. Conner, 26 Ind. App. 41; Stuckey v. Atlantic C. L. R. Co., 60 S. C. 237; Florida Cent. & P. R. Co. v. Foxworth, 41 Fla. 1, 76; Barth v. Kansas City E. R. Co., 142 Mo. 535, 556, 3 Am. Neg. Rep. 682; Knight v. Sadtler L. & Z. Co., 75 Mo. App. 541, 550; Regan v. Chicago, etc. R. Co., 51 Wis. 599; Green v. Southern Pac. Co., 122 Cal. 563; Wells v. Denver, etc. R. Co., 7 Utah 482, 17 Am. Neg. Cas. 688; Mobile & O. R. Co. v. Watly, 69

expressly made a ground of recovery by the statute of Florida.⁵¹ In Louisiana physical and mental pain and suffering are elements of damage, regardless of whether other actual damages are claimed or not; the latter if the relations existing between decedent and the plaintiff were such as should exist between persons sustaining the same relations to each other.⁵² Under the Missouri act providing for the recovery of such damages as are deemed fair and just with reference to the necessary injury resulting, parents may recover for the loss of the comfort, society and love of a child.⁵³ The Virginia statute permits the jury to award such damages as to it may seem fair and just. Under it punitive damages may be awarded, and the jury may consider the mental suffering of those for whose benefit the action was prosecuted.⁵⁴ The West Virginia act is to the same effect, and covers the same kind of compensatory

Miss. 145, 12 Am. Neg. Cas. 186; International, etc. R. Co. v. Boykin, 32 Tex. Civ. App. 72.

⁵⁰ Nohrden v. Northeastern R. Co., 59 S. C. 87, 105; Brickman v. Southern R., 74 S. C. 306.

Punitive damages are also recoverable if the facts justify them. Lundy v. Southern Bell Tel. & T. Co., 90 S. C. 25.

Under this statute an instruction as to decedent's earning capacity and expectancy is not prejudicial, for the reason that such was merely an item of damages competent for the consideration of the jury. Southern R. Co. v. Diseker, 13 Ga. App. 799 (under South Carolina statute).

⁵¹ Florida East Coast R. Co. v. Hayes, 66 Fla. 589; Seaboard A. L. R. v. Moseley, 60 Fla. 186; Callison v. Brake, 63 C. C. A. 354, 129 Fed. 196 (by parents).

⁵² Burvant v. Wolfe, 126 La. 787, 29 L.R.A.(N.S.) 677; Bourg v. Brownell-D. L. Co., 120 La. 1009, 124 Am. St. 448; Cherry v. Louisiana & A. R. Co., 121 La. 471, 17 L.R.A.(N.S.) 505, 126 Am. St. 323;

Dobyns v. Yazoo, etc. R. Co., 119 La. 72; Wooten v. United I. & R. M. Co., 128 La. 294; Robertson v. Jennings, 128 La. 795, 3 N. C. C. A. 882; Wood v. Gulf Ref. Co., 128 La. 968.

⁵³ Sharp v. National B. Co., 179 Mo. 553.

"Necessary injury" means necessary pecuniary damage. The whole of the husband's probable earnings is not the measure of his widow's recovery; that is to be measured by the value of his support and maintenance. Knight v. Sadtler L. & Z. Co., 75 Mo. App. 541; Hawkins v. Missouri Pac. R. Co., 182 Mo. 323. See also Troll v. Laclede Gas Light Co., 182 Mo. App. 600, where by necessary inference, the court gives the same effect to the phrase.

⁵⁴ Matthews v. Warner, 29 Gratt. 570, 26 Am. Rep. 396; Chesapeake & O. R. Co. v. Ghee, 110 Va. 527; Pocahontas C. Co. v. Rukas, 104 Va. 278, 20 Am. Neg. Rep. 49; Norfolk & W. R. Co. v. Cheatwood, 103 Va. 356. See Norfolk & W. R. Co. v. Stevens, 97 Va. 631, 46 L.R.A. 367.

damages as well as exemplary damages.⁵⁵ The same conclusion was announced in a California case ruled under a like statute;⁵⁶ but that case was soon disapproved, and the rule declared to be that in estimating the pecuniary losses of a wife from the death of her husband the jury may consider whether or not the deceased was a good husband, able and willing to provide well for his wife.⁵⁷ The Utah statute provides for the recovery of such damages as under all the circumstances of the case may be just. Under it the benefits which parents may derive from an adult child are "not to be limited in all cases to mere contributions of money, but may consist of the various elements that enter into the domestic relations of parent and child, living in one family or otherwise."⁵⁸ In case of the death of the husband and father the jurors may consider the benefits from the associations, comforts and pleasures that they may reasonably believe from the evidence his family would have received from him had his life been spared.⁵⁹ Though it be provided by statute that "all causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same," pain and suffering resulting from an injury are not elements of damage in an action by the administrator of the injured person brought to recover damages to the latter's estate.⁶⁰ In Connecticut damages are recoverable on the same grounds and are measured by the same rule as if the action had been brought in the lifetime of the decedent.⁶¹ Under a statute

⁵⁵ *Wigal v. City of Parkersburg*, 74 W. Va. 25; *Kelley v. Railroad Co.*, 58 W. Va. 216; *Thomas v. Electrical Co.*, 54 W. Va. 395.

⁵⁶ *Cleary v. City R. Co.*, 76 Cal. 240.

⁵⁷ *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 17 L.R.A. 71; *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515, 527, 18 Am. St. 248.

There is no legal connection between negligence resulting in the death of a person and a physical injury caused by a nervous shock produced by news of the death upon the mother of the deceased. *Norfolk & W. R. Co. v. Stevens*, Adm'r, *supra*.

There need not be a special allegation of the loss of the society, comfort, protection or services of a deceased son. *Bond v. United R.*, 159 Cal. 270.

⁵⁸ *Rogers v. Rio Grande Western R. Co.*, 32 Utah 367, 125 Am. St. 876.

⁵⁹ *Chilton v. Union Pac. R. Co.*, 8 Utah 47.

⁶⁰ *Dwyer v. Chicago, etc. R. Co.*, 84 Iowa 479, 11 Am. Neg. Cas. 522; *Hutchins v. St. Paul, etc. R. Co.*, 44 Minn. 5, 16 Am. Neg. Cas. 294.

⁶¹ *Wilmot v. McPadden*, 79 Conn. 367.

making the loss of means of support the ground of recovery, injury to the plaintiff because of over-work performed after the disability of her husband because of intoxication, is not a ground of recovery.⁶²

In some states the constitutions or statutes provide for the recovery of exemplary damages.⁶³ The right to recover such damages is given by the constitution of Kentucky: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful acts, then, in every such case, dam-

⁶² *Elshire v. Schuyler*, 15 Neb. 561.

⁶³ *Denver & R. G. R. Co. v. Fred-eric*, 57 Colo. 90; *Southern R. Co. v. Diseker*, 13 Ga. App. 799 (under South Carolina statute); *Boott Mills v. Boston & M. R. Co.*, 218 Mass. 582; *Young v. St. Louis, etc. R. Co.*, 227 Mo. 307 (under the statute of 1905; *Coleman v. Himmelberger-H. L. & L. Co.*, 105 Mo. App. 254; *Olsen v. Montana O. P. Co.*, 35 Mont. 400; *Christensen v. Floriston P. & P. Co.*, 29 Nev. 552; *Barksdale v. Seaboard A. L. R.*, 76 S. C. 183; *Osteen v. Southern R.*, 76 S. C. 368 (an amendment of the statute adopted in 1902 changed the former rule); *Brickman v. Southern R.*, 74 S. C. 306; *Louisville, etc. R. Co. v. Orr*, 91 Ala. 548, 13 Am. Neg. Cas. 60; *Thompson v. Louisville, etc. R. Co.*, 91 Ala. 496, 13 Am. Neg. Cas. 67, 11 L.R.A. 146; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 467; *Same v. Lundin*, 3 id. 100; *Turner v. Norfolk & W. R. Co.*, 40 W. Va. 675, 17 Am. Neg. Cas. 838 (but see *Couch v. Chesapeake & O. R. Co.*, 45 W. Va. 51, the judges being equally divided in opinion); *Matthews v. Warner*, 29 Gratt. 570, 26 Am. Rep. 396; *Gray v. McDonald*, 104 Mo. 303; *Barth v. Kansas City E. R. Co.*, 142 Mo. 535, 558, 3 Am. Neg. Rep. 682; *St. Louis, etc. R. Co. v. Moore*, 101 Miss. 768, 39 L.R.A. (N.S.) 978 (the

statute does not expressly provide therefor, it seems).

The California statute formerly provided for the recovery of exemplary damages; but, owing to a change, they are not now recoverable. *Lange v. Schoettler*, 115 Cal. 388.

The right to such damages is given by the Constitution of Texas to a certain class of persons, and cannot be claimed by any others. *Winnt v. International, etc. R. Co.*, 74 Tex. 32, 5 L.R.A. 172.

Under a statute allowing punitive damages within fixed limits evidence of the pecuniary injury caused by the death is inadmissible. *Ervin v. St. Louis, etc. R. Co.*, 158 Mo. App. 1. *Contra*, *Boyd v. Missouri Pac. R. Co.*, 249 Mo. 110, 4 N. C. C. A. 233.

The Colorado statute, providing that damages may be recovered for death in such amount, not exceeding \$5,000, as the jury may deem fair and just in consideration of the degree of defendant's culpability has been construed as penal, and hence evidence of pecuniary loss occasioned by the death is incompetent. *Denver & R. G. R. Co. v. Frederic*, 57 Colo. 90. The same seems to be true in Massachusetts, under the Employer's Liability Act. *Boott Mills v. Boston & M. R. Co.*, 218 Mass. 582.

ages may be recovered for such death from the corporations and persons so causing the same." This language includes, not alone compensatory damages, but all varieties of damages known to the law.⁶⁴ In Washington under a statute allowing the recovery of pecuniary or exemplary damages, both cannot be recovered in every case; in case of mere neglect the pecuniary loss measures the recovery; in case of injury caused by moral or legal wrong, amounting to wilfulness, exemplary damages may be added.⁶⁵ The last proposition appears to be in accord with a Missouri case.⁶⁶ Under the Alabama act, which provides for the recovery of such damages as the jury may assess, the damages are punitive and exemplary in every case—punitive of the act done and intended by their imposition to stand as an example to deter others from the commission of mortal wrongs or to incite to diligence in the avoidance of fatal casualties—the purpose being the preservation of human life regardless of the pecuniary value of a particular life to the next of kin under statutes of distribution. The admeasurement of the recovery must be by reference alone to the quality of the wrongful act or omission, the degree of culpability involved in the doing of the act or in the omission to act as required by the dictates of care and prudence, and without any reference to, or consideration of, the loss or injury the act or omission

⁶⁴ *Illinois Cent. R. Co. v. Outland's Adm'x*, 160 Ky. 714; *Louisville & N. R. Co. v. Setser*, 149 Ky. 162; *Louisville & N. R. Co. v. King*, 131 Ky. 347; *Illinois Cent. R. Co. v. Sheegog*, 126 Ky. 252; *Continental C. Co. v. Cole*, 146 Ky. 821; *Louisville & N. R. Co. v. Kelly*, 100 Ky. 421. But compare *Louisville & N. R. Co. v. Orr*, 91 Ala. 548.

In Kentucky it is proper to ask the court to instruct the jury to specify which part of the verdict is allowed for compensatory damages and which for those which are punitive. In a case where no such request was made, and where the verdict failed to show that any part

of the damages were exemplary, the court seems to have treated the whole verdict as compensatory damages. *Illinois Cent. R. Co. v. Outland's Adm'x*, 160 Ky. 714.

⁶⁵ *Klepsch v. Donald*, 4 Wash. 436, 444, 31 Am. St. 936.

⁶⁶ *Calcaterra v. Iovaldi*, 123 Mo. App. 347.

In Missouri the statute provides that in determining the amount of damages in an action for causing death, the jury may have regard to mitigating or aggravating circumstances attending the neglect or default of defendant. *Dalton v. St. Louis Smelting & Refining Co.*, 188 Mo. App. 529.

may occasion to the living.⁶⁷ Under the Alabama statute, known as the Employers' Liability Act, the damages recoverable are limited to such as are compensatory.⁶⁸ It has also been said that such statutes have for their purpose more than compensation; it is intended by them, also, to promote safety of life and limb by making negligence that causes death costly to the wrong-doer.⁶⁹ The general rule which requires that actual damage shall be sustained as a basis for exemplary damages applies in actions upon death statutes; the plaintiff may not object to the sufficiency of the latter.⁷⁰ If an excessive sum is awarded the court may set aside the verdict.⁷¹ Exemplary damages are recoverable in Arkansas.⁷² To be recovered against a corporation because of the act or neglect of its servant, no bad faith, evil intent, malice or intentional wrong

⁶⁷ *Jones v. Birmingham Railway, Light & Power Co.*, 12 Ala. App. 474; *Burnwell Coal Co. v. Setzer*, — Ala. —, 67 So. 604; *Richmond & D. R. Co. v. Freeman*, 97 Ala. 289, 294, 13 Am. Neg. Cas. 64, following previous cases; *Louisville & N. R. Co. v. Tegner*, 125 Ala. 593; *Same v. Lansford*, 42 C. C. A. 160, 102 Fed. 62; *McGhee v. McCarley*, 44 C. C. A. 252, 103 Fed. 55; *Randle v. Birmingham R., L. & P. Co.*, 169 Ala. 314; *Kennedy v. Davis*, 171 Ala. 609; *Osteen v. Southern R.*, 76 S. C. 368; *Louisville & N. R. Co. v. Perkins*, 1 Ala. App. 376.

Under this statute an instruction which permitted the jury to assess the amount of damages recoverable for the death of a child at "a small sum or nominal damages" if they found that such sum would sufficiently punish defendant was held erroneous by its reference to nominal damages. *Illinois Cent. R. Co. v. Robinson*, — Ala. —, 66 So. 519.

In *Sloss-S. S. & I. Co. v. Drane*, 88 C. C. A. 34, 160 Fed. 780, the right to recover punitive damages

under the Alabama Code of 1896 is denied; the recovery need not be limited to compensatory damages, but may extend to such as the jury may award in their discretion under proper instructions.

It is immaterial whether the deceased was an adult or a minor. *Louisville & N. R. Co. v. Bogue*, 177 Ala. 349.

Damages cannot be mitigated by proof of the care and competence of the person whose act or neglect caused the death. *Adler v. Martin*, 179 Ala. 97.

⁶⁸ *Southern Iron & Steel Co. v. Boston*, — Ala. —, 66 So. 684; *Citizens' L., H. & P. Co. v. Lee*, 182 Ala. 561.

⁶⁹ Per *Shelby, C. J.*, in *Whitmer v. El Paso & S. W. Co.*, 119 O. C. A. 637, 201 Fed. 193. The statute considered provided for exemplary damages.

⁷⁰ *Louisville & N. R. Co. v. Street*, 164 Ala. 155.

⁷¹ *Cox v. Birmingham R., L. & P. Co.*, 163 Ala. 170.

⁷² *St. Louis, etc. R. Co. v. Stamps*, 84 Ark. 241.

being shown, it must appear that the master had knowledge of the servant's unfitness or incapacity.⁷³ Under the Missouri act there can be a recovery of punitive damages only under circumstances which would have permitted their recovery if the action had been brought by the deceased.⁷⁴ Under the Nevada statute it is not required that the complaint specify what portion, or whether any, of the damages asked are claimed as exemplary.⁷⁵ The constitution of Texas provides that in case of wilful homicide there shall be responsibility for exemplary damages. Where a case is within that provision the jury may be directed to award such damages,⁷⁶ if actual damages are recoverable.⁷⁷ Exemplary damages are recoverable under the

⁷³ *Benner v. Truckee River G. E. Co.*, 193 Fed. 740.

⁷⁴ *Kuehne P. Co. v. Allen*, 78 C. C. A. 418, 148 Fed. 666.

Section 5425 of the Revised Statutes of Missouri, 1909, providing for both compensatory and punitive damages for death or injury caused by a public conveyance is inapplicable to cases of injury or death due to an automobile, although section 8523 of the same statute provides that for injury or death caused by an automobile "damages for such injury or death may be recovered as provided in section 5425," and in such case only compensatory damages are recoverable. The reason given is that section 5425 contained a reference to a penalty which was lacking in section 8523. *Roberts v. Trunk*, 179 Mo. App. 358.

⁷⁵ *Peers v. Nevada P., L. & W. Co.*, 118 Fed. 400.

⁷⁶ *Morgan v. Barnhill*, 55 C. C. A. 1, 118 Fed. 24; *Holland v. Gloss* (Tex. Civ. App.), 146 S. W. 671.

The Texas statute gives an action for "actual damages" when death is caused by the negligence or carelessness of the proprietor, owner, char-

terer or hirer of any railroad, * * * or by the unfitness, gross negligence or carelessness of their servants or agents; when it is caused by the wrongful act, negligence, unskilfulness or default of another; and in a separate section provides that when death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered. These provisions are construed to authorize exemplary damages only for the defendant's wilful act, omission or gross negligence; if the defendant is a corporation the act, omission or negligence must be attributable to one who represented it in its corporate capacity, as its officer, not of a mere ordinary servant or agent. *Houston, etc. R. Co. v. Cowser*, 57 Tex. 293; *International, etc. R. Co. v. McDonald*, 75 id. 41. The retention in the defendant's service of the servant whose negligence has caused death is not sufficient to constitute a ratification of his act so as to authorize the imposition of exemplary damages. *Id.*

⁷⁷ *Wilson v. Brown* (Tex. Civ. App.), 154 S. W. 322.

civil damage statute of Illinois⁷⁸ and Tennessee.⁷⁹ There cannot be a recovery of such damages under the death statutes of several states.⁸⁰ In New York interest is recoverable from the date of death in accordance with the general rule relating to injuries to property.⁸¹ In Michigan where the damages are computed as of the time of the death interest may be added to the date of the trial.⁸² Questions as to damages for death arising under the Federal Employers' Liability Act are treated elsewhere.⁸³

§ 1264. **Recovery of nominal damages.** In England and some states of the Union some actual damages must be shown as essential to the maintenance of the action; merely to show that, in other respects, the facts bring the case within the statute will not entitle the plaintiff to nominal damages.⁸⁴ There is reasonable ground for this doctrine where the statute requires that the damages shall be apportioned among the beneficiaries;⁸⁵ and where it is provided that the recovery shall be such sum as the jury shall deem fair and just.⁸⁶ The general rule in the United States is that at least nominal damages may be recovered. "The

⁷⁸ *Belting v. Hobbett*, 142 Ill. 72.

⁷⁹ *Union R. Co. v. Carter*, 129 Tenn. 459. Under Shannon's Code, §§ 4025-4028, a widow may recover not only compensatory damages for her own loss, but also any damages which deceased might have recovered if he had survived, and punitive damages if the facts make a proper case for the allowance of such damages. Where the recovery exceeds the amount of compensatory damages the excess is to be regarded as smart money.

⁸⁰ *Western U. Tel. Co. v. Catlett*, 100 C. C. A. 489, 177 Fed. 71 (passing on the North Carolina act which provides for the recovery of a fair and just compensation for the pecuniary damage); *Palmer v. Philadelphia*, etc. R. Co., 218 Pa. 114; *Atchison*, etc. R. Co. v. *Townsend*, 71 Kan. 524, 18 Am. Neg. Rep. 328.

⁸¹ *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 149, 8 Am. Neg. Rep. 490, 51 L.R.A. 235.

⁸² *Larsen v. Home Tel. Co.*, 164 Mich. 295.

⁸³ Ch. 40.

⁸⁴ *Vining v. Rexford (Pa.)*, 201 Fed. 904; *Duckworth v. Johnson*, 4 H. & N. 653, 15 Am. Neg. Rep. 633; *Boulter v. Webster*, 13 Week. Rep. 289; *Lazelle v. Newfane*, 70 Vt. 440, 446; *McGown v. International*, etc. R. Co., 85 Tex. 289; *Cooper v. Shore E. Co.*, 63 N. J. L. 558, 567; *Rouse v. Detroit E. R.*, 128 Mich. 149; *Romeo v. Western C. & M. Co.*, 157 Ill. App. 67; *Rader v. Galveston*, etc. R. Co. (Tex. Civ. App.), 137 S. W. 718.

⁸⁵ *Shallue v. Long Tunnel G. M. Co.*, 10 Vict. L. R. (law) 56.

⁸⁶ *Kelley v. Railroad Co.*, 58 W. Va. 216, 2 L.R.A.(N.S.) 898.

only condition," says Comstock, J., "on which the right of the administrator to sue under the statute depends is the common-law right of the injured person to maintain an action if he were living."⁸⁷ "It may be added," he said, "that, as the statute expressly gives the right of action, nominal damages at least could be recovered."⁸⁸ And where the action is given for the benefit of the widow or next of kin, and it appears there are such, there may be a recovery to that extent, though no actual or substantial loss to them be shown.⁸⁹ Where collateral kindred are the parties in interest proof of damage must be made or nominal damages cannot be recovered,⁹⁰ at least in a court of admiralty.⁹¹ Where lineal and collateral kindred join as parties and substantial injury is shown by the former, the recovery is not limited to a nominal sum.⁹²

Actual damages resulting from the death are made recover-

⁸⁷ *Quin v. Moore*, 15 N. Y. 434.

⁸⁸ *Id.*; *Lyons v. Cleveland, etc. R. Co.*, 7 Ohio St. 337, 70 Am. Dec. 75; *St. Louis, etc. R. Co. v. Binn*, 10 Kan. App. 468, 8 Am. Neg. Rep. 602; *Pizzi v. Reid*, 72 App. Div. (N. Y.) 162; *Seaboard A. L. R. v. Moseley*, 60 Fla. 186; *Savage v. Hayes*, 142 Ill. App. 316; *Atchison, etc. R. Co. v. Fajardo*, 74 Kan. 314; *Davis v. Arkansas S. R. Co.*, 117 La. 320; *Crabtree v. Missouri Pac. R. Co.*, 86 Neb. 33, 136 Am. St. 633, citing the text; *Morgan v. Oronogo Circle M. Co.*, 160 Mo. App. 99. Compare *Regan v. Chicago, etc. R. Co.*, 51 Wis. 599.

⁸⁹ *Swift v. Johnson*, 71 C. C. A. 619, 138 Fed. 867, 1 L.R.A. (N.S.) 1161; *Bonato v. Peabody C. Co.*, 156 Ill. App. 196; *Brennen v. Chicago & C. C. Co.*, 147 id. 263; *Cleveland, etc. R. Co. v. Starks*, 174 Ind. 345; *Rockford, etc. R. Co. v. Delaney*, 82 Ill. 198; *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690; *Chicago v. Scholten*, 75 Ill. 468; *Chicago, etc. R. Co. v. Shannon*, 43

id. 338, 14 Am. Neg. Cas. 368; *Grottenkemper v. Harris*, 25 Ohio St. 510; *Pennsylvania R. Co. v. Keller*, 67 Pa. 300; *North Pennsylvania R. Co. v. Kirk*, 90 id. 15; *Howard v. Delaware & H. R. C. Co.*, 40 Fed. 195, 6 L.R.A. 75; *Kelley v. Chicago, etc. R. Co.*, 50 Wis. 381, 17 Am. Neg. Cas. 905; *North Chicago St. R. Co. v. Brodie*, 156 Ill. 317; *Burk v. Arcata & M. R. R. Co.*, 125 Cal. 364, 73 Am. St. 52; *Chicago, etc. R. Co. v. Gunderson*, 174 Ill. 495; *Anderson v. Chicago, etc. R. Co.*, 35 Neb. 95, 102; *Jenkins v. Hankins*, 98 Tenn. 545, 559; *Broughel v. Southern New England Tel. Co.*, 73 Conn. 614. But see *Hurst v. Detroit City R. Co.*, 84 Mich. 539, 548.

⁹⁰ *Chicago, etc. R. Co. v. Gunderson, supra*; *Pittsburgh, etc. R. Co. v. Reed*, 44 Ind. App. 635.

⁹¹ *In re California N. & I. Co.*, 110 Fed. 670.

⁹² *Grace & H. Co. v. Strong*, 224 Ill. 630.

able by a variety of expressions in the several statutes, but they are all interpreted in general to indicate substantially the same view on phases of the injury. The main inquiry is, what is the pecuniary loss to those persons for whose benefit in a particular case the action is brought? What aid or advantage, having a pecuniary value, have these persons lost by reason of the death? This inquiry is considerably diversified by the different relationships embraced by the statute. This consideration justifies separate generalization of the action relative to each class of beneficiaries.

§ 1265. **Recovery by widow.** The recovery by a widow of damages resulting to her from the death of her husband will be governed by the general rule applicable to all the beneficiaries provided for by the statute, which is the present value of her reasonable expectation of pecuniary advantage from the continuance of the life of the deceased,⁹³ regard being had to the

⁹³ *Kipros v. Uintah Ry. Co.*, 45 Utah 389; *Frechett v. Illinois Cent. R. Co.*, 188 Ill. App. 377; *Chesapeake & P. Tel. Co. v. State*, 124 Md. 527; *Boos v. Minneapolis, St. P. & S. S. M. R. Co.*, 127 Minn. 381; *Powell v. Union Pac. R. Co.*, 255 Mo. 420; *Zitnik v. Union Pac. R. Co.*, 95 Neb. 152; *Radley v. Leray Paper Co.*, 214 N. Y. 32, L.R.A.1915E 1199, [motion for reargument denied, 214 N. Y. 688]; *Arnold v. State*, 163 App. Div. (N. Y.) 253; *Embler v. Gloucester Lumber Co.*, 167 N. C. 457; *Great Western Coal & Coke Co. v. Coffman*, 43 Okla. 404; *Great Western Coal & Coke Co. v. Boyd*, 43 Okla. 438; *St. Louis & S. F. R. Co. v. Long*, 41 Okla. 177; *Big Jack Min. Co. v. Parkinson*, 41 Okla. 125; *McDaniel v. Lebanon Lumber Co.*, 71 Ore. 15; *Gillett v. Flanner-Steger Land & Lumber Co.*, 159 Wis. 578; *Secord v. John Schroeder Lumber Co.*, 160 Wis. 1; *Belstner v. Town of Sumner*, 157 Wis. 556; *Sadowski v. Thomas Furnace Co.*, 157 Wis.

443; *Missouri, etc. R. Co. v. West*, 38 Okla. 581; *Gulf, etc. R. Co. v. Beezley* (Tex. Civ. App.), 153 S. W. 651; *McDonald v. Sydney*, 46 Nova Scotia 436; *Hoffman v. R. Co.*, *infra*; *Louisville & N. R. Co. v. Morris*, 179 Ala. 239; *St. Louis, etc. R. Co. v. Freeman*, 89 Ark. 326; *Kansas City S. R. Co. v. Henrie*, 87 Ark. 443; *Consolidated S. Co. v. Staggs*, 164 Ind. 331; *Larsen v. Home Tel. Co.*, 164 Mich. 295; *Gundy v. Nye-S. F. Co.*, 89 Neb. 599; *Young v. Beveridge*, 81 Neb. 180; *Hackney v. Delaware & A. Tel. Co.*, 69 N. J. L. 335; *New York, etc. R. Co. v. Roe*, 4 Ohio C. C. (N.S.) 284; *Irwin v. Pennsylvania R. Co.*, 226 Pa. 156; *Burns v. Same*, 219 Pa. 225; *Carmona v. Fajando D. Co.*, 5 Porto Rico Fed. 209; *International, etc. R. Co. v. McVey*, 99 Tex. 28; *David v. Southwestern R. Co.*, 41 Ga. 223; *Potter v. Chicago, etc. R. Co.*, 21 Wis. 372, 7 Am. Neg. Cas. 157, 94 Am. Dec. 548; *Louisville, etc. R. Co. v. Case*, 9 Bush 728;

prospect of his advancement and increased salary under civil service rules; ⁹⁴ but evidence as to the specific salaries of higher positions is not admissible.⁹⁵ The damages recoverable by her

Railroad Co. v. Barron, 5 Wall. 93; Telfer v. Northern R. Co., 30 N. J. L. 188, 12 Am. Neg. Cas. 275; Rafferty v. Buckman, 46 Iowa 195; Louisville, etc. R. Co. v. Stacker, 86 Tenn. 343, 17 Am. Neg. Cas. 443, 6 Am. St. 840; Central R. Co. v. Thompson, 76 Ga. 770; San Antonio T. Co. v. White, 94 Tex. 468, 9 Am. Neg. Rep. 616; Harrison v. Sutter St. R. Co., 116 Cal. 156, 1 Am. Neg. Rep. 403; Hayes v. Williams, 17 Colo. 465, 474, 13 Am. Neg. Cas. 573; Williams v. Walton, 9 Houst. 322, 13 Am. Neg. Cas. 787; Louisiana E. R. Co. v. Carstens, 19 Tex. Civ. App. 190; English v. Southern Pac. Co., 13 Utah 407, 421, 12 Am. Neg. Cas. 626, 57 Am. St. 772, 35 L.R.A. 155; Abbot v. McCadden, 81 Wis. 563, 29 Am. St. 910; Liermann v. Chicago, etc. R. Co., 82 Wis. 286, 33 Am. St. 37; Harkins v. Pullman P. C. Co., 52 Fed. 724; May v. West Jersey & S. R. Co., 62 N. J. L. 67, 5 Am. Neg. Rep. 417; McHugh v. Schlosser, 159 Pa. 480, 39 Am. St. 699, 23 L.R.A. 574; Alabama M. R. Co. v. Jones, 114 Ala. 519, 1 Am. Neg. Rep. 551, 62 Am. St. 121; Oakes v. Maine Cent. R. Co., 95 Me. 103; McLean v. Board, 7 Vict. L. R. (law) 239; Greenwood v. King, 82 Neb. 17.

An instruction which fails to limit the measure of damages to the pecuniary loss sustained by the wife as a result of her husband's death is not prejudicial where the damages recovered would not have been excessive under a proper instruction. Great Western Coal & Coke Co. v. Coffman, 43 Okla. 404; Great Western Coal & Coke Co. v. Boyd, 43 Okla. 438.

The fact that decedent was in the habit of becoming intoxicated is competent as bearing on his probable earnings and consequently on the financial loss sustained by the wife as a result of his death. Fearon v. New York Life Ins. Co., 162 App. Div. (N. Y.) 560.

⁹⁴ Central R. Co. v. Minor, 2 Ga. App. 804; King v. Ann Arbor R. Co., 144 Mich. 65; Conrad v. New York Cent., etc. R. Co., 137 App. Div. (N. Y.) 372; Geary v. Metropolitan St. R. Co., 73 App. Div. (N. Y.) 441. See Hoffman v. Chicago, etc. R. Co., 91 Neb. 783.

Due allowance for the probable increase in the earning capacity of the decedent may be made where it is shown he was in the line of promotion. The jury must not indulge in extravagant speculation outside the evidence as to what the increased earning capacity might be. The burden is on the plaintiff to produce evidence of a substantial nature to show what the future earnings would probably be and their present value. St. Louis, etc. R. Co. v. Freeman, 89 Ark. 326.

The earnings of the decedent in an occupation he had followed, it not appearing he was disqualified to pursue it or had permanently abandoned it, may be shown. Alabama G. S. R. Co. v. McWhorter, 156 Ala. 269.

⁹⁵ Barr v. Southern California Edison Co., 24 Cal. App. 22; Big Jack Min. Co. v. Parkinson, 41 Okla. 125; Ittner B. Co. v. Ashby, 198 Ill. 562; Kountz v. Toledo, etc. R. Co., 189 Fed. 494; Vreeland v. Michigan Cent. R. Co., id. 495; Ward v. Dampskibsselskabet Kjoebenhavn,

will include the value of her support by and the protection of her husband during the time he would probably have lived and supported her but for his death, unless her life expectancy is less than his.⁹⁶ The jury may also consider the addition that the earnings of the deceased would probably have made to his wealth and property had he continued to live, and the reasonable expectation the widow had of pecuniary advantage by ultimately receiving a share of such earnings as one of his

144 Fed. 524; *Peters v. Southern Pac. Co.*, 160 Cal. 48; *Paris, etc. R. Co. v. Robinson*, 104 Tex. Civ. App. 482, 5 N. C. C. A. 622; *Voelker v. Hill-O. C. Co.*, 153 Mo. App. 1; *Haines v. Pearson*, 107 Mo. App. 481; *Neary v. Northern Pac. R. Co.*, 41 Mont. 480; *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. 659; *Halverson v. Seattle E. Co.*, 35 Wash. 600; *Keeley v. Great Northern R. Co.*, 139 Wis. 448; *Ryan v. Oshkosh G. L. Co.*, 138 Wis. 466; *Dyas v. Southern Pac. Co.*, 140 Cal. 296; *Hale v. San Bernardino Valley T. Co.*, 156 Cal. 713.

There must be a time limit on the value of such support, and evidence to show its value. *Texas & P. R. Co. v. Gullett* (Tex. Civ. App.), 134 S. W. 262.

If the allowance in favor of a widow on account of the loss of the society, comfort and protection of her husband exceeds that made on account of her pecuniary loss, it will be deemed excessive. *Florida Cent. & P. R. Co. v. Foxworth*, 41 Fla. 1, 45 Fla. 278.

The earnings of the deceased just prior to death are to be considered in connection with his capacity, the probable duration of his life and the amount of his earnings which would probably have gone to his family. *Jones v. Kansas City, etc.*

R. Co., 178 Mo. 528, 20 Am. Neg. Rep. 674, 101 Am. St. 434.

It is presumed that the deceased was industrious and sober, treated his family properly and, having a fixed income, gave them adequate support. *Toledo R. & L. Co. v. Ward*, 25 Ohio C. C. 399, 2 Ohio C. C. (N.S.) 256. "And even if he had not theretofore performed such duties his widow had a right to their performance, and is not to be limited to merely nominal damages for the negligent destruction of that right." *Voelker v. C. Co.*, *supra*.

The words "necessary injury" include any damages which may be estimated according to a pecuniary standard, whether present, prospective or proximate. *Barth v. Kansas City E. R. Co.*, 142 Mo. 535, 559, 3 Am. Neg. Rep. 682.

Under some civil damage acts all the consequences of loss of support may be recovered and such other loss as may be proved. *Pilkins v. Hans*, 87 Neb. 7.

In Delaware the recovery is controlled by the probable time the deceased would have lived but for the wrong, and the portion of his gross earnings or income the wife would have received from him. *Gatta v. Philadelphia B. & W. R. Co.*, 2 Boyce (Del.) 551.

⁹⁶ *Helena G. Co. v. Rogers*, 104 Ark. 59.

heirs.⁹⁷ The amount of his probable accumulations would depend on his age, occupation, habits, bodily health and ability.⁹⁸ In considering the accumulations which the deceased

⁹⁷ *Tidmarsh v. Chicago, etc. R. Co.*, 149 Wis. 590; *Peters v. Southern Pac. Co.*, 160 Cal. 48; *New York, etc. R. Co. v. Roe*, 4 Ohio C. C. (N. S.) 284; *Neary v. Northern Pac. R. Co.*, 41 Mont. 480; *Texas & N. O. R. Co. v. Walker*, 58 Tex. Civ. App. 615; *Gray v. Phillips*, 54 Tex. Civ. App. 148; *Spiking v. Consolidated R. & P. Co.*, 33 Utah 313 (accumulations likely to be produced by the skill, personal supervision and diligence of the deceased); *Ryan v. Oshkosh G. L. Co.*, 138 Wis. 466; *West v. Bayfield M. Co.*, 144 Wis. 106, 5 N. C. C. A. 279; *Lawson v. Chicago, etc. R. Co.*, 64 Wis. 448, 54 Am. Rep. 634, 10 Am. Neg. Cas. 562; *Castello v. Landwehr*, 28 Wis. 522; *Annas v. Milwaukee, etc. R. Co.*, 67 id. 48, 58 Am. Rep. 848, 10 Am. Neg. Cas. 546; *Kaspari v. Marsh*, 74 Wis. 563, 17 Am. Neg. Cas. 924; *Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 168; *Florida Cent. & P. R. Co. v. Foxworth*, 41 Fla. 1, 76; *Chicago & A. R. Co. v. Kelly*, 182 Ill. 267, 272, 6 Am. Neg. Rep. 488, aff'g 80 Ill. App. 675; *Gulf, etc. R. Co. v. Johnson*, 1 Tex. Civ. App. 103; *Rudiger v. Chicago, etc. R. Co.*, 101 Wis. 292, 302; *Bauer v. Richter*, 103 Wis. 412, 420. *Contra*, *Baltimore & P. R. Co. v. Golway*, 6 App. Cas. (D. C.) 142, 178, and see cases cited *infra*, this section.

Under a statute making the gross value of a husband's life the measure of his widow's recovery, regardless of whether she had, previous to his death, received anything from him or not, and without regard to what his personal expenses may

have been, the increased prosperity of his family after his death is irrelevant. *Boswell v. Barnhart*, 96 Ga. 521, 14 Am. Neg. Cas. 82.

Conversely it seems that if the evidence tends to show that the expectation of the widow could not be more than the mere necessities of life in a very humble station, her recovery will be cut down accordingly, as where the deceased was 49 years of age and was a steady worker, but had accumulated no property. In that case on appeal the court drew the inference that the daily wage, of which there was no evidence, could not have been large if at that age deceased had saved nothing. *Belstner v. Town of Sumner*, 157 Wis. 556.

⁹⁸ *Missouri, etc. R. Co. v. West*, 38 Okla. 581; *Burns v. Pennsylvania R. Co.*, 219 Pa. 225; *Pocahontas C. Co. v. Rukas*, 104 Va. 278, 20 Am. Neg. Rep. 49; *Norfolk & W. R. Co. v. Cheatwood*, 103 Va. 356; *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94; *Holmes v. Oregon, etc. R. Co.*, 6 Sawyer 262; *Au v. New York, etc. R. Co.*, 29 Fed. 72; *Shaber v. St. Paul, etc. R. Co.*, 28 Minn. 103, 12 Am. Neg. Cas. 169; *Chicago v. Scholten*, 75 Ill. 468; *Chicago, etc. R. Co. v. Moranda*, 93 id. 302, 14 Am. Neg. Cas. 362, 34 Am. Rep. 168; *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409; *Taylor v. Western Pac. R. Co.*, 45 Cal. 323, 13 Am. Neg. Cas. 349; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287, 5 Am. Neg. Cas. 97; *Catawissa R. Co. v. Armstrong*, 52 Pa. 282; *Mansfield, etc. Co. v. McEnery*, 91 id. 185, 36 Am. Rep. 662; *Kesler v. Smith*, 66 N. C.

might have made to his estate the future income of invested capital, disconnected with his personal exertions, and any such income beyond that which is the result of such exertions is to be excluded.⁹⁹ A wife has a right to support during her life out of her husband's estate.¹ She partakes of the benefits of his affluence while they both live, and if she survive her share of the estate is always augmented by its increase. So long as the legal relation of husband and wife exists, without reference to the will of the husband, the wife not having forfeited her right as such by her own wrong, she is entitled to support from him in accordance with her station in life.² Hence, the damages to which she is entitled are not affected though her husband left her a year or more before his death and had no communication with her in the meantime, and intended never to return to her or contribute to her support.³ But it is otherwise if, during his

154; *Burton v. Wilmington, etc. R. Co.*, 82 id. 504; *Nashville, etc. R. Co. v. Prince*, 2 Heisk. 580; *Central R. Co. v. Thompson*, 76 Ga. 770; *Baltimore, etc. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; *Opsahl v. Judd*, 30 Minn. 126; *Ohio, etc. R. Co. v. Voight*, 122 Ind. 288, 9 Am. Neg. Cas. 291; *Railway Co. v. Sweet*, 60 Ark. 550; *Belting v. Hobbett*, 142 Ill. 72; *Boyd v. Missouri Pac. R. Co.*, 249 Mo. 110 (ruled under § 5425, R. S. 1909).

⁹⁹ *Underwood v. Old Colony St. R. Co.*, 33 R. I. 319; *McAdory v. Louisville & N. R. Co.*, 94 Ala. 272.

¹ *Bish. Marr. Women*, §§ 57, 58, 892.

² *Florida Cent. & P. R. Co. v. Foxworth, supra*; *Pittsburgh, etc. R. Co. v. Burton*, 139 Ind. 357, 377.

As damages are to be assessed as of the date of decedent's death it is immaterial when plaintiff and decedent were married. *Radley v. Leray Paper Co.*, 214 N. Y. 32, L.R.A. 1915E 1199 [motion for reargument denied, 214 N. Y. 688].

³ *Dallas & W. R. Co. v. Spieker*, 61 Tex. 427, 48 Am. Rep. 297; *Central R. Co. v. Bond*, 111 Ga. 13; *Ingersoll v. Detroit & M. R. Co.*, 163 Mich. 268, 32 L.R.A.(N.S.) 362. Compare *Creamer v. Moran*, 41 Wash. 636, where such facts are referred to as bearing on the measure of the recovery. See § 1267. There seems to be a good reason for permitting inquiry into the relations of the deceased with his wife as bearing upon the value of her right to his support, and especially the value of his care and protection of her. *Holland v. Closs* (Tex. Civ. App.), 146 S. W. 671.

Similarly, evidence that the husband and wife did not live together at the time of the husband's death, or the reasons therefor was held incompetent, unless the offer of evidence was accompanied by an offer to prove desertion or other forfeiture of the right to support. *Boos v. Minneapolis, St. P. & S. S. M. R. Co.*, 127 Minn. 381.

life-time, the wife has lost her legal right to support by living in adultery.⁴ Aside from offenses against the marital relation, the habits and moral character of the widow are not open to investigation.⁵ There may be added to the foregoing elements of damage the value of the services of a deceased husband and father in the superintendence, attention to, and care of his family, and the education of his children.⁶ But it is otherwise, in an action brought for the benefit of the widow and next of kin, as to the funeral expenses,⁷ and the cost of nursing, medical attention, etc.⁸

Life tables (though they are not essential,⁹ nor conclu-

⁴ *Stimpson v. Wood*, 57 L. J. (Q. B.) 484, 59 L. T. Rep. 218, 36 Week. Rep. 734; *Orendorf v. New York Cent., etc. R. Co.*, 119 App. Div. (N. Y.) 638.

⁵ *Boos v. Minneapolis, St. P. & S. S. M. R. Co.*, 127 Minn. 381; *Consolidated S. Co. v. Morgan*, 160 Ind. 241.

⁶ *Kansas City S. R. Co. v. Henrie*, 87 Ark. 443; *St. Louis, etc. R. Co. v. Caraway*, 77 Ark. 405; *Jones v. Kansas City, etc. R. Co.*, 178 Mo. 528, 20 Am. Neg. Rep. 674, 101 Am. St. 434; *Carmona v. Fajardo D. Co.*, 5 Porto Rico Fed. 209 (loss of society); *Railway Co. v. Sweet*, 57 Ark. 287, 295; § 1263.

In some cases the language is less specific—as that in determining the pecuniary damages it may be shown what kind and character of a husband and father the deceased was. *Darks v. Scudder-G. G. Co.*, 146 Mo. App. 246. But see *Roth v. Bien*, 33 Ohio Cir. Ct. 480, [aff'd 87 Ohio St. 483], holding that evidence of a father's disposition and conduct toward the children is incompetent where the circumstances under which the evidence is offered show that it was offered merely to enhance damages.

Under a statute providing for

such damages as the jury may consider proper, considering all damages of every kind to any and all the parties interested, it is proper to regard the loss to the wife and children of the companionship, protection and society of the husband and father, but not by way of *solatium*. *St. Louis, etc. R. Co. v. Moore*, 101 Miss. 768, 39 L.R.A. (N.S.) 978.

⁷ *Maney v. Chicago, etc. R. Co.*, 49 Ill. App. 105, 113.

In New York funeral expenses are not an element of damages for the death of a husband unless the beneficiary is legally liable to pay them. In *re Huth*, 152 N. Y. Supp. 215.

⁸ *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; *Same v. Waade*, 54 Ill. App. 215, 226.

⁹ *Rober v. Northern Pac. R. Co.*, 25 N. D. 394; *Standard Oil Co. v. Reagan*, 15 Ga. App. 571; *Clark v. Iowa Cent. R. Co.*, 162 Iowa 630; *Boswell v. Barnhart*, 96 Ga. 521, 524; *Philadelphia, etc. R. Co. v. Tucker*, 35 App. Cas. (D. C.) 123, citing the text and holding that the jury could judge as to the age and health of the plaintiff from seeing her; *Warren, etc. R. Co. v. Waldrop*, 93 Ark. 127 (expectancy may be

sive¹⁰) if they approximately show the expectancy of life of persons of the age of him whose rights are involved or upon whose expectancy of life such rights depend,¹¹ are persuasive evidence¹² and may be used to ascertain the gross amount of the value of life;¹³ (and if unopposed by other evidence should

judged of from appearance); *Little v. Bousfield*, 165 Mich. 654; *Ruehl v. Lidgerwood Rural Tel. Co.*, 23 N. D. 6; *Atchison, etc. R. Co. v. Hughes*, 55 Kan. 491, 503, 3 Am. Neg. Cas. 479; *Kansas City S. R. Co. v. Morris*, 80 Ark. 528 (expert testimony is admissible); *South Omaha v. Sutcliffe*, 72 Neb. 746; *Young v. Beveridge*, 81 Neb. 180 (conclusion may be arrived at from age, health and appearance).

The average duration of the decedent's life is to be assumed though he was engaged in a dangerous occupation. *Dobyns v. Yazoo, etc. R. Co.*, 119 La. 72.

¹⁰ *Standard Oil Co. v. Reagan*, 15 Ga. App. 571; *Moses v. Mathews*, 95 Neb. 672; *San Bois Coal Co. v. Resetz*, 43 Okla. 384; *Secord v. John Schroeder Lumber Co.*, 160 Wis. 1; *Texas Mexican R. Co. v. Higgins*, 44 Tex. Civ. App. 523; *Louisville & N. R. Co. v. Anderson*, 150 Ala. 350.

The jury may find that the duration of a particular life would have been much longer and that the earning capacity of the deceased would have extended over a greater period than the tables show. *Sternfels v. Metropolitan St. R. Co.*, 73 App. Div. (N. Y.) 494.

As data or evidence, tending to show expectancy of life, mortality tables are not conclusive. Their weight as such is determinable by the triers of fact. To be competent, it is not necessary that evidence be offered to show that deceased conformed to the standard of health
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and vigor adopted in such tables. Such evidence goes to the weight, and not to the competency of the tables as evidence. *Broz v. Omaha M. & G. Hospital Ass'n*, 96 Neb. 648, L.R.A.1915D 334. To a similar effect see *San Bois Coal Co. v. Resetz*, 43 Okla. 384.

Where life tables are admitted to prove the expectancy of life of decedent when killed, a defendant who has not at the trial asked for an instruction defining the evidentiary effect to be given to the tables cannot assign as error the fact that the court did not of its own motion give such an instruction. *Murray v. Omaha Transfer Co.*, 95 Neb. 175.

¹¹ *Railways Ice Co. v. Howell*, — Ark. —, 174 S. W. 241; *Kansas City Southern R. Co. v. Leslie*, 112 Ark. 305, rev'd 238 U. S. 599; *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318; *Wabash R. Co. v. Gretzinger*, 182 Ind. 155; *Illinois Cent. R. Co. v. Outland's Adm'x*, 160 Ky. 714; *Murray v. Omaha Transfer Co.*, 95 Neb. 175; *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 586; *Pearl v. Omaha, etc. R. Co.*, 115 Iowa 535; *Decker v. McSorley*, 111 Wis. 91, 13 Am. Neg. Rep. 631; *Valente v. Sierra R. Co.*, 158 Cal. 412; *Chicago, etc. R. Co. v. Hambel*, 2 Neb. (Unof.) 607.

¹² *Secord v. John Schroeder Lumber Co.*, 160 Wis. 1.

¹³ *Ward v. Dampskibsselskabet Kjoebenhavn*, 144 Fed. 524; *Springfield E. L. & P. Co. v. Calvert*, 134 Ill. App. 285; *Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 168, 1 Am.

be controlling);¹⁴ but such amount must be reduced to its present value; in other words, where the value of the life, less the personal expenses of the deceased, is the measure of damages the sum awarded must not exceed the amount which would be realized each year during the estimated continuance of life by his net earnings,¹⁵ or by the contributions he would have made

Neg. Rep. 403; *Belting v. Hobbett*, 142 Ill. 72; § 455.

¹⁴ *Secord v. John Schroeder Lumber Co.*, 160 Wis. 1.

Where life tables were offered in evidence to prove decedent's expectancy of life, and were objected to on the sole ground that such tables were not authenticated to be correct, which objection was overruled, and no exception taken, defendant is precluded from assigning as error the fact that such expectancy was not proved to be that which was shown by the tables. *Devine v. Grand Trunk Western Ry. Co.*, 188 Ill. App. 612.

¹⁵ *Clark v. Iowa Cent. R. Co.*, 162 Iowa 630; *Sadowski v. Thomas Furnace Co.*, 157 Wis. 443; *St. Louis, etc. R. Co. v. Hitt*, 76 Ark. 227; *Engvall v. Des Moines City R. Co.*, 145 Iowa 560; *Louisville & N. R. Co. v. Massie*, 138 Ky. 449; *Little v. Bousfield*, 165 Mich. 654; *Rivers v. Bay City T. Co.*, 164 Mich. 696; *Goodes v. Lansing S. T. Co.*, 150 Mich. 494; *Roberson v. L. Co.*, *infra*; *Watson v. Seaboard A. L. R. Co.*, 133 N. C. 188; *Burns v. Pennsylvania R. Co.*, 219 Pa. 225; *McCabe v. Narragansett E. L. Co.*, 26 R. I. 427; *West v. Bayfield M. Co.*, 144 Wis. 106, 5 N. C. C. A. 279; *Atlantic, etc. R. Co. v. Newton*, 85 Ga. 517; *Rowley v. London, etc. R. Co.*, L. R. 8 Ex. 221; *Pittsburgh, etc. R. Co. v. Burton*, 139 Ind. 356, 378, 11 Am. Neg. Cas. 475; *McAdory v. Louisville & N. R. Co.*,

94 Ala. 272, 13 Am. Neg. Cas. 114; *Houston, etc. R. Co. v. Cowser*, 57 Tex. 293; *Alabama M. R. Co. v. Jones*, 114 Ala. 519, 62 Am. St. 121.

The data by which a court may test the propriety of a verdict has been stated in a late Wisconsin case as follows: 1st, The average earning power of the deceased at the time of his death; 2nd, His expectancy of life; 3rd, His probable average earning power during such expectancy, considering his condition of health, what he had been accustomed to earn and all the circumstances bearing on the question; 4th, The proportion of such earning capacity which with reasonable certainty would have reached the wife had he not been taken away; 5th, The present worth thereof; and 6th, The amount it would take to purchase an income during the expectancy of his life equal to the amount the dependents would probably have received out of his earnings. *Secord v. John Schroeder Lumber Co.*, 160 Wis. 1.

Upon proof of a person's age, health and earning capacity a jury may estimate the value of her life, and reduce that value to its present cash value by any method satisfactory to them which produces a result which is reasonable and authorized by the evidence. If they adopt a method other than that suggested by the court, and reach a result fairly deducible from the evidence, the verdict will be sustained, al-

during his life expectancy for the support of his family as shown by what he had contributed thereto.¹⁶ In Pennsylvania a widow, without regard to her life expectancy, takes such a proportion of the damages as she would have taken in her husband's personal estate if he had died intestate; hence her expectancy of life is not material.¹⁷

In considering the personal expenses of the deceased the amount he was expending for the education and maintenance of a brother and money saved for the purpose of investing in land from month to month are not to be deducted from his gross earnings.¹⁸ In estimating the accumulations the deceased would probably have made the jury should be instructed to consider that, in his declining years he might experience diminished capacity to labor and earn money.¹⁹ Where the testimony was to the effect that the deceased spent all his earnings on himself and his wife the court assumed that one-half thereof was used for her benefit, and that at the end of his expectancy of life nothing would have been saved. The measure of the wife's recovery was such sum as, being put to interest, will each year, by taking a part of the principal and adding it to the

though another result might be reached by the method suggested by the court, provided the result obtained be legal, just and accurate. *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 8 N. C. C. A. 209.

The method prevailing in the forum governs the reduction of damages though the cause of action arose elsewhere. *Georgia, etc. R. Co. v. Sasser*, 4 Ga. App. 276.

By statute in Georgia no deduction is to be made for the personal expenses of the husband had he lived. *Central R. Co. v. Newman*, 138 Ga. 145.

¹⁶ *Meola v. Quincy M. Co.*, 174 Mich. 305.

The pecuniary loss to a widow by reason of her husband's death must be measured by the present worth of such portion of his earnings, had he lived to the limit of his expect-

ancy of life, as would with reasonable certainty have inured to her. *Sadowski v. Thomas Furnace Co.*, 157 Wis. 443.

¹⁷ *Emery v. Philadelphia*, 208 Pa. 492, 16 Am. Neg. Rep. 563, distinguishing *Baltimore, etc. T. R. Co. v. State*, 71 Md. 573.

¹⁸ *Louisville & N. R. Co. v. Morgan*, 114 Ala. 449, 458, 2 Am. Neg. Rep. 294.

Only such deduction is to be made from the probable earnings of the deceased as are reasonably necessary to meet his personal expenses, considering his age, manner of living, calling and other circumstances. *Roberson v. Johnson L. Co.*, 154 N. C. 328; *Carter v. Railroad*, 139 N. C. 499 (not his expenditures).

¹⁹ *Western & A. R. Co. v. Moore*, 94 Ga. 457.

interest, yield one-half the sum of the earnings of the deceased.²⁰ If there is reasonable expectation that the widow would receive something from the surplus earnings of the husband, an allowance should be made therefor.²¹ But this hard-and-fast rule is not everywhere approved. It is said by an able judge that it was undoubtedly proper for the jury to consider under the evidence what amount of money invested in an annuity would yield the yearly amount the widow and next of kin²² would probably have received from the deceased had he lived, but they were not bound to allow damages based upon that method, nor any particular method of investment of money. It would be proper for a jury, upon proper evidence, to consider what amount invested in government bonds, well-secured mortgages on real estate, or any other safe security, would yield the annual amount the injured parties would probably have received from the deceased had he lived; but it would not be the province of the court to direct them to allow an amount based upon any one of these methods of investment. Indeed, if, after considering all of the evidence, they found difficulty in arriving at a conclusion by mathematical calculations based on any method of investment, they would be authorized to estimate the loss according to their own good sense and sound judgment.²³

²⁰ *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350, 13 Am. Neg. Cas. 140; *Decatur C. W. & Mfg. Co. v. Mehaffey*, 128 Ala. 242.

²¹ *Rudiger v. Chicago, etc. R. Co.*, 101 Wis. 292.

²² For cases where the court on appeal by use of this method tested the verdict to see whether it was excessive or not see *Railways Ice Co. v. Howell*, — Ark. —, 174 S. W. 241; *Kansas City Southern R. Co. v. Leslie*, 112 Ark. 305, rev'd 238 U. S. 599; *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 8 N. C. C. A. 207; *Wabash R. Co. v. Gretzinger*, 182 Ind. 155; *Clark v. Iowa Cent. R. Co.*, 162 Iowa 630; *Zitnik v. Union Pac. R. Co.*, 95 Neb. 152; *Gillett v. Flanner-Steger Land & Lumber Co.*,

159 Wis. 578; *Secord v. John Schroeder Lumber Co.*, 160 Wis. 1; *Sadowski v. Thomas Furnace Co.*, 157 Wis. 443.

²³ Per Sanborn, C. J., in *St. Louis, etc. R. Co. v. Needham*, 3 C. C. A. 129, 52 Fed. 371; *Houston & T. Cent. R. Co. v. Turner*, 34 Tex. Civ. App. 397, 17 Am. Neg. Rep. 272. See § 1268; *Harkins v. Pullman P. C. Co.*, 52 Fed. 724; *Baltimore & O. R. Co. v. Golway*, 6 App. Cas. (D. C.) 143, 178; *Honea v. St. Louis, etc. R. Co.*, 245 Mo. 621.

In passing on an instruction limiting the jury to the present worth of the probable amount the deceased would have contributed to the support of the plaintiff, it was said that while the jury may not arbi-

It was also held error to instruct the jury that if they believed the plaintiff's expectancy of life was greater than that of her husband they could add to the sum which would purchase such an annuity the present value of any property that she would probably have received as dower if the husband had not been killed. The earnings of the deceased had been used in support of his family. The court observed: Under this evidence so many chances and contingencies of life and death, of sickness and health, of accident and injury, of the birth and rearing of children, conditioned the lives and relations of this husband and wife that no court was authorized to instruct the jury that they must allow the widow one-third or one-half of the present value of the husband's probable future accumulations if they were of the opinion she would have outlived him if he had not been killed.²⁴ Where several years have elapsed since the death and before the trial and the next of kin have not received anything the deferred payments on the annuity basis and interest thereon should be awarded, and the present value of an annuity for the remaining portion of the estimated life of the decedent.²⁵

The number and the ages of children dependent upon a widow for support are proper subjects of proof in an action by her to recover for the death of her husband. Such evidence shows her loss. During the husband's life-time he was bound to support them; after his death that obligation, to the extent of her pecuniary ability, devolved upon their mother.²⁶ The ill-

trarily assess such sum as to them may seem "proportionate to the injury," without reference to the facts and circumstances of the case, yet the law does confide in them considerable discretion, and the court should not undertake to lay down a fixed rule by which they must be governed. *Merchants & P.'s O. Co. v. Burns*, 96 Tex. 573, 17 Am. Neg. Rep. 267. And that a calculation based on the present worth of the estimated earnings of the deceased leaves out of consideration the element of an increase in earning ca-

capacity, and assumes that existing rates of interest will continue. The law leaves the damages to the fair judgment of the jury subject to the power of the court over the verdict. *Texas & P. R. Co. v. Johnson*, 48 Tex. Civ. App. 135.

²⁴ *St. Louis, etc. R. Co. v. Needham*, *supra*.

²⁵ *Danskin v. Pennsylvania R. Co.*, 83 N. J. L. 522.

²⁶ *Hughes v. Danville Brick Co.*, 180 Ill. App. 603; *Burton v. Kansas City*, 181 Mo. App. 427; *Zitnik v. Union Pac. R. Co.*,

health of the plaintiff may be shown,²⁷ as may the physical condition of the children, the time they have been receiving medical attention and their continued need of it.²⁸ The financial situation of the widow or next of kin cannot be gone into;²⁹ nor can it be shown that she gave birth to a still-born child after

95 Neb. 152; Galveston, H. & S. A. Ry. Co. v. Pennington, — Tex. Civ. App. —, 166 S. W. 464; Boyer v. Northwestern E. R. Co., 174 Ill. App. 161; Boyd v. Missouri Pac. R. Co., 249 Mo. 110 (ruled under § 5425, R. S. 1909); The San Rafael, 72 C. O. A. 388, 141 Fed. 270; Choctaw, etc. R. Co. v. Doughty, 77 Ark. 1; Bonato v. Peabody C. Co., 156 Ill. App. 196; Beyer v. Peoria, etc. T. Co., id. 47; Pittsburgh, etc. R. Co. v. Sudhoff, 173 Ind. 314; Voelker v. Hill-O. C. Co., 153 Mo. App. 1; Brinkman v. Gottenstroeter, 153 Mo. App. 351; Ogan v. Missouri Pac. R. Co., 142 Mo. App. 248; Williams v. Metropolitan St. R. Co., 141 Mo. App. 625; Hartnett v. United Rys. Co. of St. Louis, 162 Mo. App. 554; Hamann v. Milwaukee B. Co., 136 Wis. 39; Horr v. Howard Co., 126 Wis. 160; Mulcairns v. Janesville, 67 Wis. 24, 17 Am. Neg. Cas. 903, 907, 908; Louisville & N. R. Co. v. Banks, 132 Ala. 471; Coffeyville M. & G. Co. v. Carter, 65 Kan. 565, 12 Am. Neg. Rep. 594; Pool v. Southern Pac. Co., 7 Utah 303, 310, 17 Am. Neg. Cas. 687, 693; Chilton v. Union Pac. R. Co., 8 Utah 47, 17 Am. Neg. Cas. 695; English v. Southern Pac. Co., 13 Utah 407, 421, 57 Am. St. 772, 35 L.R.A. 155; Alabama M. R. Co. v. Jones, 114 Ala. 519, 1 Am. Neg. Rep. 551, 62 Am. St. 121; Abbot v. McCadden, 81 Wis. 563, 29 Am. St. 910; Felton v. Spiro, 24 C. C. A. 321, 2 Am. Neg. Rep. 682, 78 Fed. 576; Hunt v. Conner, 26 Ind. App. App. 41; Railroad v.

Davis, 104 Tenn. 442, 452; Spiro v. Felton, 73 Fed. 91. *Contra*, Litchfield & N. R. Co. v. Shuler, 134 Ill. App. 615; Illinois Cent. R. Co. v. Ashline, 56 id. 475; but compare Chicago & A. R. Co. v. Pearson, 82 id. 605, 614; Chicago Edison Co. v. Moren, 86 id. 152. See Eichorn v. New Orleans, etc. R., L. & P. Co., 114 La. 712.

And so under a statute fixing the limits of a penalty. Boyd v. Missouri Pac. R. Co., 249 Mo. 110, 4 N. C. C. A. 233.

The number of children is only competent as tending to show the amount of pecuniary loss. Zitnik v. Union Pac. R. Co., 95 Neb. 152.

If the children have a separate right of action evidence as to them is inadmissible. Larzelere v. Kirchgessner, 73 Mich. 276.

²⁷ Coffeyville M. & G. Co. v. Carter, The San Rafael, Hamann v. B. Co., *supra*; Evarts v. Santa Barbara C. R. Co., 3 Cal. App. 712. *Contra*, Seattle E. Co. v. Hartless, 75 C. C. A. 317, 144 Fed. 379.

²⁸ Simoneau v. Pacific E. R. Co., 159 Cal. 494, 2 N. C. C. A. 137.

²⁹ Lee v. Toledo, St. L. & W. R. Co., 184 Ill. App. 144; Hughes v. Danville Brick Co., 180 Ill. App. 603; Gundy v. Nye-Schneider-Fowler Co., 89 Neb. 599; Consolidated G., etc. Co. v. Smith, 109 Md. 186, 21 Am. Neg. Rep. 262; Litchfield & M. R. Co. v. Shuler, 134 Ill. App. 615; Pittsburgh, etc. R. Co. v. Kinmare, 203 Ill. 388; Brennen v. Chicago & C. C. Co., 241 Ill. 610, and local cases cited.

the cause of action accrued.³⁰ Under the act of congress of 1885,³¹ which provides that the creditors of the deceased shall not have any interest in the recovery and that the damages shall be assessed with reference to the injury done to the widow and next of kin of the deceased, it is proper to show that the latter were helpless young children, and that they and their mother depended for support entirely upon the father and husband. The injury done by taking his life was much greater to persons so situated than it would be to next of kin able to maintain themselves, and who had never depended, and had no right to depend, upon the deceased for their maintenance.³² Adult children are not to be wholly ignored in the assessment of damages.³³ The use made of the earnings of the decedent may be shown.³⁴

³⁰ *Preble v. Wabash R. Co.*, 149 Ill. App. 584 (not fatal error).

Under a statute providing for the recovery of such damages as are a fair and just compensation for the pecuniary injuries sustained the widow may show she was dependent upon deceased for support (*Amas v. Milwaukee & N. R. Co.*, 67 Wis. 46, 58 Am. Rep. 848), and sustain an allegation in the complaint that a child was born and died after the death of the husband. *Preble v. Wabash R. Co.*, 243 Ill. 340.

³¹ Ch. 126, 23 Stats. 307.

³² *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 93, 39 L. ed. 624, 631, 13 Am. Neg. Cas. 803.

But it has been held erroneous to instruct the jury that they may consider that the decedent was the sole support of his wife. *Kerrigan v. Market St. R. Co.*, 138 Cal. 506.

³³ *Toledo R. & L. Co. v. Ward*, 2 Ohio C. C. (N.S.) 256.

³⁴ *Pittsburgh, etc. R. Co. v. Kinare*, 203 Ill. 388; *Chicago, R. I. & P. R. Co. v. Gunn*, 112 Ark. 401; *Lee v. Toledo, St. L. & W. R. Co.*, 184 Ill. App. 144; *Hughes v. Danville Brick*

Co., 180 Ill. App. 603; *Wabash R. Co. v. Gretzinger*, 182 Ind. 155; *Powell v. Union Pac. R. Co.*, 255 Mo. 420; *Arnold v. State*, 163 App. Div. (N. Y.) 253; *San Bois Coal Co. v. Resetz*, 43 Okla. 384; *St. Louis & S. F. R. Co. v. Long*, 41 Okla. 177; *Galveston, H. & S. A. Ry. Co. v. Pennington*, — Tex. Civ. App. —, 166 S. W. 464; *Southern Pac. Co. v. Vaughn*, — Tex. Civ. App. —, 165 S. W. 885.

The sum contributed by the deceased to the support of his family ought to be shown; it cannot be inferred from proof of his earnings, nor from the knowledge of jurors as to the probable cost thereof, at least in the absence of evidence as to the manner in which the family lived. *St. Louis, etc. R. Co. v. Caraway*, 77 Ark. 405. It is essential to the recovery of more than nominal damages that it be shown what the deceased contributed to the support of his family. *Brennen v. Chicago & C. C. Co.*, 147 Ill. App. 263.

Evidence of the amount of decedent's household expenses is competent as tending to throw some light

The widow's remarriage will not preclude her from maintaining the action³⁵ nor affect the amount she is entitled to recover;³⁶ nor will the fact that she married the deceased after he sustained the injury which resulted in his death, the statute giving the right of action to his "widow."³⁷ Under a statute

on the amount of pecuniary loss sustained by the wife by the death of the husband. *Powell v. Union Pac. R. Co.*, 255 Mo. App. 420.

In an action by a widow for the death of her husband, evidence is competent that deceased was a "good provider." *Ft. Worth & D. O. Ry. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

Similarly it was shown that decedent spent no money for foolishness, but passed his pay check to his wife, who paid bills and banked the balance. *St. Louis & S. F. R. Co. v. Long*, 41 Okla. 177.

Where it does not appear what proportion of his wages the deceased contributed to his family, the jury may not infer that he contributed the entire amount earned, but it may infer that he contributed the larger portion. In this case it was held that a fair inference would be that he contributed three-fourths. *Railways Ice Co. v. Howell*, — Ark. —, 174 S. W. 241.

³⁵ *International, etc. R. Co. v. Kuehn*, 70 Tex. 582, 12 Am. Neg. Cas. 602, 603.

³⁶ *Richardson F. Co. v. Peters*, 82 Ill. App. 508; *Chicago, etc. R. Co. v. Lagerkrans*, 65 Neb. 566; *Chicago, etc. R. Co. v. Driscoll*, 207 Ill. 9; *Consolidated S. Co. v. Morgan*, 160 Ind. 241. See *Jones v. McMillan*, 129 Mich. 86; *Hewitt v. East Jordan L. Co.*, 136 Mich. 110.

"The reason is that a right of action arises at the time of the death to recover just what was lost by it; and the loss thus occasioned

is none the less, even though the injured party thereafter acquire, through his own skill or industry, or the charity or affection of another, more than he lost." *St. Louis, etc. R. Co. v. Cleere*, 76 Ark. 377.

The Georgia code provides that "a widow, and if no widow, a child or children, may recover for the homicide of the husband or parent," and gives the right of survivorship to the children if the widow dies. A right of action in a widow does not die on her remarriage; and the fact that thereby she becomes the wife of a wealthy man does not lessen the amount she may recover. *Georgia R. & B. Co. v. Garr*, 57 Ga. 277, 24 Am. Rep. 492.

There the damages may be mitigated by proof of the deceased's contributory negligence. *Atlantic, etc. R. Co. v. Newton*, 85 Ga. 517.

³⁷ *Gross v. Electric T. Co.*, 180 Pa. 99.

It is provided by statute in New York that if the deceased shall have left him surviving a wife or a husband, but no children, the damages shall be for the sole benefit of such wife or husband, and that the damages shall be such sum as the jury deem to be a fair and just compensation for the pecuniary injuries resulting from decedent's death. The plaintiff married the decedent in good faith after his injury, which he survived only two days. The trial court instructed that the recovery was the value of the reasonable expectation of benefit from the

which is both penal and compensatory the dependence of the widow upon the deceased for support may be shown.³⁸ The recovery is not affected by the ability of the widow to support herself.³⁹

Insurance received by a widow from a policy on her husband's life is not to be deducted from the damages assessed in her favor in an action to recover for his death,⁴⁰ nor a pension which she receives pursuant to law.⁴¹ In England it has been said that the widow is benefited only by the accelerated receipt of the policy money, and that benefit, being represented by the interest on the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased.⁴² But Lord Campbell charged the jury that the amount due on an accident policy should be deducted, and that with regard to the policies upon the life of the deceased, other than accident, if you allow any deduction

continuance of life to be calculated upon the condition of the decedent at the time of the marriage. This was erroneous. "But for the fact that defendant negligently injured decedent the plaintiff would naturally have been entitled to receive from her husband her support and all the incidental pecuniary advantages of the marital relation. These advantages she has lost because of her husband's death. Their pecuniary value to her is the measure of her damages due to his death." *Radley v. Leray P. Co.*, 156 App. Div. (N. Y.) 429.

³⁸ *Kettelkake v. American C. & F. Co.*, 171 Mo. App. 528.

³⁹ *Wavle v. Michigan United R. Co.*, 170 Mich. 81, 4 N. C. C. A. 729.

⁴⁰ *Deel v. Heiligenstein*, 244 Ill. 239 (under the Dram-Shop Act); *Illinois Cent. R. Co. v. Prickett*, 109 App. 468; *Houston & T. Cent. R. Co. v. Lemair*, 55 Tex. Civ. App. 237; § 158; *Galveston, etc. R. Co. v. Cody*, 20 Tex. Civ. App. 520; *Coul-*

ter v. Pine, 164 Pa. 543; *Sherlock v. Alling*, 44 Ind. 184, 199; *Althorf v. Wolfe*, 22 N. Y. 355, 16 Am. Neg. Cas. 749; *Terry v. Jewett*, 17 Hun 395; *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304; *Stahler v. Philadelphia & R. R. Co.*, 199 Pa. 383; *Western & A. R. v. Meigs*, 74 Ga. 857; *Clune v. Ristine*, 36 C. C. A. 450, 6 Am. Neg. Rep. 416, 94 Fed. 745; *Lipscomb v. Houston, etc. R. Co.*, 95 Tex. 5, 55 L.R.A. 869.

The same rule applies where deceased had accident insurance. *Tyler S. R. Co. v. Raspberry*, 11 Tex. Civ. App. 185. But see *San Antonio, etc. R. Co. v. Long*, 87 Tex. 148, 24 L.R.A. 637, 47 Am. St. 87, as modified by *Gulf, etc. R. Co. v. Younger*, 90 Tex. 387, 391, 1 Am. Neg. Rep. 378.

⁴¹ *Geary v. Metropolitan St. R. Co.*, 73 App. Div. (N. Y.) 441; *Devine v. Chicago*, 172 Ill. App. 246.

⁴² *Grand Trunk R. Co. v. Jennings*, L. R. 13 App. Cas. 800.

(and I think you will probably consider that some deduction ought to be allowed), it will only be in respect, I should think, of the premiums that would be paid by the family, or which would have been paid by himself, if this fatal accident had not happened. I leave that, however, entirely in your hands.⁴³ The cases cited appear to establish the law of England as being that the defendant can mitigate the damages to the extent that pecuniary benefit results to the plaintiff from the death.⁴⁴ The English law has been changed by 8 Edw. VII., ch. 7. In Ontario when the action is under the Fatal Accidents Act insurance is to be taken into account, but the jury are not required to deduct the whole amount for which the life of the deceased was insured.⁴⁵ But there must be more than probability that benefit will inure to the widow because of the death of the husband. It has been held by the court of appeal of New Zealand that neither the probability, at the time of the death, that a fund will be raised by public subscription for the benefit of the families of a number of men killed by an accident, nor the facts that since the death and before action brought a more or less definite trust of the fund has been created, under which those for whom the action is brought will, in all probability, participate (though at the discretion of the trustee), are fit subjects for the consideration of the jury in estimating the damages to be allowed to the family of a person killed.⁴⁶ And it has been decided in Arkansas that a conditional provision made by government for the benefit of the widow and minor children of a deceased pensioner is not to be considered in mitigation of their damages.⁴⁷ Evidence of the defendant's generosity in taking up a collection for the benefit of the plaintiff and paying for medical and surgical assistance rendered the decedent should not be received.⁴⁸ Neither are the damages to be mitigated because the husband and father left an estate. "The contrary is true.

⁴³ Hicks v. Newport, etc. R. Co., 4 B. & S. 403, note.

⁴⁴ Bradburn v. Great Western R. Co., L. R. 10 Ex. 1, 3.

⁴⁵ Dawson v. Niagara, etc. R. Co., 23 Ont. App. 670.

⁴⁶ Greymouth-Point Elizabeth R.

& C. Co. v. McIvor, 16 New Zeal. L. R. 258.

⁴⁷ Railway Co. v. Maddry, 57 Ark. 306, 11 Am. Neg. Cas. 133.

⁴⁸ Linden v. Anchor M. Co., 20 Utah 134.

If a man deserts his family, leaving nothing for their support, and has accumulated no property, these facts constitute evidence tending to show that very slight, if any, damage results to the family from his death. If, on the contrary, a man is of industrial and economical habits, of business sagacity, and has in the past supported his family and accumulated property, the natural presumption is that such habits will continue if his life be prolonged, and that the damage to his family by reason of his untimely death is enhanced by those very facts. The estate left to the family would presumably be not less productive in the hands of the husband and father himself had he lived, and its income would inure to the benefit of the family as much had he lived as after his death.⁴⁹ The possession of an estate by the widow is also immaterial to the liability of the defendant.⁵⁰ Evidence as to what the deceased would have done in any given case of business management is inadmissible because it does not afford a reliable basis for computing the damages.⁵¹ If the earnings of the family have not decreased since the death of the husband the fact may be explained.⁵² Under a civil damage statute the widow may recover, in addition to the value of the husband's support, the cost of necessary medical attendance and the funeral expenses incurred by her.⁵³

Though the statutes of the state under which the action is brought do not limit the amount of the recovery in the par-

⁴⁹ *Houston v. Gran*, 38 Neb. 687; *Sloss-S. S. & I. Co. v. Holway*, 144 Ala. 280; *Nilson v. Chicago, etc. R. Co.*, 84 Neb. 595; *Chicago, etc. R. Co. v. Hambel*, 2 Neb. (Unof.) 607; *Same v. Bayfield*, 37 Mich. 205. See *Same v. Trippett*, 50 Tex. Civ. App. 279; § 1267.

Under a statute giving the decedent's widow the right to recover the gross value of his life, without regard to what she had received from him, and aside from his personal expenses, the better condition of his family after his death is irrelevant. *Boswell v. Barnhart*, 96 Ga. 521.

In *Yergy v. Helena L. & R. Co.*, 39 Mont. 213, the court seems to have been influenced by the size of the fortune left the widow and the disposition made of it by the decedent.

⁵⁰ *Deel v. Heiligenstein*, 244 Ill. 239.

⁵¹ *Indianapolis & M. R. T. Co. v. Reeder*, 51 Ind. App. 533; *Karau v. Pease*, 45 Ill. App. 382.

⁵² *Horst v. Lewis*, 71 Neb. 365.

⁵³ *Keeling v. Pommer*, 83 Neb. 510. The act provided for the recovery of all damages sustained by the wife and children on account of the traffic.

ticular action, they have been sometimes given weight in fixing the damages where that is done by the court, as in admiralty suits.⁵⁴ But in other actions the court will not pay attention to such statutes if that of the jurisdiction is later in date than they and contains no limitation as to the amount of the recovery.⁵⁵ It is apparent from what has preceded that there are so many considerations of a non-pecuniary nature which may be taken into account by the jury, that much must be left to their discretion in fixing the compensation in any case. The same aversion to interference with its conclusion prevails in cases of this nature as in others; and the fact that the court would have fixed the award at a considerably less sum is not ground for its interference with the verdict.⁵⁶

⁵⁴ *The Oceanic*, 61 Fed. 338, 363.

⁵⁵ *Redfield v. Oakland Con. St. R. Co.*, 110 Cal. 277.

⁵⁶ In a recent case a man aged thirty-five years and earning \$1.25 a day left a wife and two small children. His chief qualifications for earning money were that he was "stout, healthy and sober." The jury gave a verdict for \$10,000 compensatory damages. In reply to an objection that the award was excessive the court observed: "If it was our duty to calculate from these facts the pecuniary value of his life to his wife and children at the date of his death we would not be able to make it reach near the sum given by the verdict. While the law does not, in this character of action, intend to give compensation for anything but pecuniary loss by estimating the money value of the life of the relative, and while it necessarily results that regard must in each instance be paid to such facts and conditions as cast light upon the subject, yet it must be admitted the inquiry is not intended to be narrowed down by the law to a result that can be exactly accounted

for by the facts in evidence. Every parent and husband has, for his wife and children, a pecuniary value beyond the amount of his earnings by his labor or vocation. That value may to some but not to every extent be susceptible of allegation and proof, and to the extent that it can be alleged and proved it ought to be done. The difficulties of proof are known to the lawmaker. In some states an attempt has been made to remove them by placing limits to the amount that may be recovered. In establishing such rules the idea of making compensation in each instance for the pecuniary value of the lost life is necessarily abandoned. When no amount is fixed by law and no rule is prescribed for making the valuation upon facts incapable of exact ascertainment, we think that the lawmaker intended that, having reference as far as practicable to conditions existing at the time of the death, juries from their own knowledge, experience and sense of justice should fix and assess the proper sum. They are expected to act uninfluenced by passion, prejudice or

§ 1266. **Recovery by husband.** The right of a husband to damages resulting from the death of his wife extends to all elements of his loss which have a pecuniary value. He cannot generally recover damages of a sentimental character,⁵⁷ as for loss of her society or companionship,⁵⁸ nor for anything which cannot be measured by money and satisfied by a pecuniary recompense;⁵⁹ but the loss of household service accustomed to

partiality, and to pay due regard to the ascertained facts and conditions surrounding the subject. When it appears to the court that they have disregarded these requirements their verdict should be set aside. On the other hand, when the court is unable to determine that these things have not been observed by the jury, and when it does not appear that the verdict is not the result of the honest endeavor of the jury to follow their own convictions in the exercise of a power not precisely defined, we think that the law intends that the jury's estimate rather than the equally undefined one of the judges shall prevail." *Missouri Pac. R. Co. v. Lehmborg*, 75 Tex. 61. In *St. Louis, etc. R. Co. v. Johnston*, 78 Tex. 536, a verdict for \$5,000 each in favor of a widow and a daughter seven years old was sustained, the deceased having been earning \$125 per month.

⁵⁷ *Denver, etc. R. Co. v. Gunning*, 33 Colo. 280; *Davis v. Guarnieri*, 45 Ohio St. 470, 482, 4 Am. St. 548; *Bolinger v. St. Paul, etc. R. Co.*, 36 Minn. 418, 12 Am. Neg. Cas. 140, 1 Am. St. 680; *Chicago v. Major*, 18 Ill. 349, 360, 68 Am. Dec. 553; *Holton v. Daly*, 106 Ill. 131, 138; *Chicago, etc. R. Co. v. Morris*, 26 id. 400; *Gaither v. Kansas City, etc. R. Co.*, 27 Fed. 544; *Little Rock, etc. R. Co. v. Barker*, 39 Ark. 491; *St. Louis, etc. R. Co. v. Freeman*, 36 id. 41, 11 Am. Neg. Cas. 147; *Au v.*

New York, etc. R. Co., 29 Fed. 72; *Demarest v. Little*, 47 N. J. L. 28, 16 Am. Neg. Cas. 643; *Rains v. St. Louis, etc. R. Co.*, 71 Mo. 165, 36 Am. Rep. 459, 16 Am. Neg. Cas. 452; *Nelson v. Lake Shore & M. S. R. Co.*, 104 Mich. 582. See § 1263.

⁵⁸ *Bolinger v. R. Co.* 36 Minn. 418, 12 Am. Neg. Cas. 140, 1 Am. St. 680; *Tilley v. Hudson River R. Co.*, 24 N. Y. 474; *McIntyre v. New York Cent. R. Co.*, 37 id. 295, 5 Am. Neg. Cas. 97; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Etherington v. Prospect Park, etc. R. Co.*, 88 N. Y. 641; *Board of Com'rs v. Legg*, 93 Ind. 523, 47 Am. Rep. 390; *International & G. N. R. Co. v. Boykin*, 32 Tex. Civ. App. 72.

A recovery by the husband as personal representative for the death of his wife bars an action by him as husband to recover for the loss of her society from the time of her injury until her death. *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. 385.

There cannot be joined with an action for the death one for the physical and mental suffering of the deceased during the period between the accident and the death. *Owensboro & N. R. Co. v. Barclay*, 102 Ky. 16.

⁵⁹ *Telfer v. R. Co.*, *supra*.

Under a statute of Virginia in an action by a husband for the death of his wife testimony is properly received to show that she was loving,

be performed by the wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered,⁶⁰ as is also the loss to the children of the care and moral training of their mother.⁶¹ In some states the pecuniary loss resulting from the deprivation of the services, society and comfort of the wife may be recovered.⁶² In Texas there may be recovery of the expenses necessarily incurred by reason of the injuries sustained by a wife and which caused her death.⁶³ In Ohio the husband, suing in his individual capacity, may recover the funeral expenses, they not being recoverable by the administrator.⁶⁴ If the deceased had no descendants or next

tender, dutiful, thrifty, industrious, economical and prudent, and that after he married her there was a change for the better in his habits and pecuniary condition. These qualities constitute an element of damages in fixing the *solatium* to be awarded to him. *Simmons v. McConnell*, 86 Va. 494.

Among the important considerations in an action to recover for the loss of a wife and mother who was not engaged in earning money are the number and ages of her children, her efficiency and devotedness to her family. *Valente v. R. Co.*, 158 Cal. 412.

⁶⁰ *Collins v. St. John*, 38 New Bruns. 86; *Moses v. Mathews*, 95 Neb. 672; *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 586.

Although in an action to recover for the death of a wife it is competent to show the expense of servants necessary to do the household work performed by the deceased, yet such evidence is not always a true index to the pecuniary loss suffered by the husband, and such question must be determined with regard to the circumstances of each case. *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 586. To a similar effect see *Moses v. Mathews*, 95 Neb. 672.

⁶¹ *McArdle v. Pittsburg R. Co.*, 41 Pa. Super. Ct. 162; *Valente v. R. Co.*, *Graysonia-N. L. Co. v. Carroll*, *infra*; *St. Lawrence, etc. R. Co. v. Lett*, 11 Can Sup. Ct. 422, 26 Am. & Eng. R. Cas. 454; *Pennsylvania R. Co. v. Goodman*, 62 Pa. 332; *Board of Com'rs v. Legg*, *supra*; *Redfield v. Oakland Con. St. R. Co.*, 112 Cal. 220, 228; *Nelson v. R. Co.*, 101 Mich. 582; *May v. West Jersey, etc. R. Co.*, 62 N. J. L. 63.

In *Delaware, etc. R. Co. v. Jones*, 128 Pa. 308, the court held that the husband in a suit for the negligent killing of his wife sixty-six years of age, he having shown that deceased had always been a healthy woman, was not bound to prove special damages, as if the subject of his loss had been a horse or other animal and was entitled to recover substantial damages for the pecuniary loss to him without making such proof.

⁶² *Valente v. Sierra R. Co.*, 158 Cal. 412; *Graysonia-N. L. Co. v. Carroll*, 102 Ark. 460.

⁶³ *International, etc. R. Co. v. Boykin* (Tex. Civ. App.), 74 S. W. 93.

⁶⁴ *Cincinnati, etc. R. Co. v. Taylor*, 27 Ohio C. C. 757.

of kin and the husband would be entitled to the whole of her personal estate evidence of the amount of the work, earnings and probable profits of the deceased is competent, whether the business in which she was engaged was hers individually, in which the husband had an expectant pecuniary interest, or whether it was his business in which she rendered services.⁶⁵ Under a statute making the capacity of the deceased to earn money a consideration in the estimate of damages evidence of such capacity is competent though she had never earned money and probably would not have done so had life continued.⁶⁶ In arriving at the value of the services a wife would have rendered the cost of her maintenance must be deducted.⁶⁷

The statute looks to prospective advantages of a pecuniary nature which have been cut off by the premature death; and the word "pecuniary" is used in distinction to those injuries to the affections and sentiments which arise from the death of relatives and which, though most fearful and grievous to be borne, cannot be measured or recompensed by money.⁶⁸ Evidence that the husband had married again and that his second wife performed like services and duties and contributed in like manner as the first to the support of the family and the accumulation of property is not admissible in mitigation of damages.⁶⁹ Nor is the fact that the life of the deceased was insured for the benefit of those in whose favor the action is brought.⁷⁰ If the jury may give such damages as they deem fair and just in reference to the pecuniary injury resulting to the plaintiff from the death, proof may be made of the husband's circumstances and financial condition.⁷¹ Where correct instruc-

⁶⁵ *Meyer v. Hart*, 23 App. Div. (N. Y.) 131; *Austin v. Metropolitan St. R. Co.*, 108 App. Div. (N. Y.) 249; *Denver, etc. R. Co. v. Gunning, infra*.

⁶⁶ *Dillon v. Hudson, etc. R. Co.*, 73 N. H. 367.

⁶⁷ *Gorton v. Harmon*, 152 Mich. 473; *Denver, etc. R. Co. v. Gunning*, 33 Colo. 280.

⁶⁸ *Tilley v. R. Co.*, *supra*.

⁶⁹ *Davis v. Guarnieri*, 45 Ohio St.

470, 482, 4 Am. St. 548; *Gulf, etc. R. Co. v. Younger*, 90 Tex. 387; *Georgia R. & B. Co. v. Garr*, 57 Ga. 277; *Dimmey v. Wheeling & E. G. R. Co.*, 27 W. Va. 32, 7 Am. Neg. Cas. 111, 55 Am. Rep. 292.

⁷⁰ § 1265.

⁷¹ *Thoresen v. La Crosse City R. Co.*, 94 Wis. 129, 133, 12 Am. Neg. Cas. 657, and local cases cited.

tions concerning the elements of damages have been given there may be added thereto a statement that the jurors' observation, experience and knowledge, conscientiously applied to the facts and circumstances, are important considerations in fixing the sum to be awarded.⁷² Under a statute providing for the distribution of the sum recovered among the husband and children in the same proportions as the personalty of the decedent would have been had she died intestate, the death of the husband pending an action instituted by him does not affect the recovery where his administrator is substituted as plaintiff and the action is prosecuted for the benefit of the children of both decedents.⁷³

Expediting the death of a patient by carelessness, inhuman and cruel treatment on the part of the attending physician is more than a mere technical injury, and cannot be compensated for by the imposition of nominal damages.⁷⁴ In North Carolina the measure of damages to be recovered by a husband for the death of his wife is the net present value of the life taken,⁷⁵ and evidence of the number of deceased's children is incompetent.⁷⁶

§ 1267. **Children's loss from death of parent.** During minority children may ask compensation for such loss on the same principles, by the same measure and ascertained by proof of the same facts as a widow for the death of her husband. There is a legal right to support,⁷⁷ and a like expectancy of

⁷² *Denver, etc. R. Co. v. Gunning*, 33 Colo. 280; *Rautman v. Chicago Con. T. Co.*, 156 Ill. App. 457; *Chicago, etc. R. Co. v. Groner*, 43 Tex. Civ. App. 264.

⁷³ *McArdle v. Pittsburg R. Co.*, *supra*.

⁷⁴ *Gray v. Little*, 126 N. C. 385.

⁷⁵ *Lynch v. Rosemary Mfg. Co.*, 167 N. C. 98; *Bradley v. Ohio River & C. R. Co.*, 122 N. C. 972. Hence it was error to instruct the jury without qualification that it might take into consideration the amount of deceased's probable earnings for the balance of the wife's expectancy

of life. *Lynch v. Rosemary Mfg. Co.*, *supra*.

⁷⁶ *Lynch v. Rosemary Mfg. Co.*, 167 N. C. 98; *Bradley v. Ohio River & C. R. Co.*, 122 N. C. 972. In the last named case the reason of the rule is stated to be that as in that state the value of the life taken, as an industrious or idle mother, is the test, and not the necessities of the family, such evidence would tend to furnish the jury with a motive for assessing damages in an amount greater than the value of the life.

⁷⁷ *McPherson v. St. Louis, etc. R.*

benefit from the distribution of the parent's estate. The jury is not confined in estimating the damage to any exact mathematical calculation, but is vested with considerable discretion, with which the courts will not interfere unless it has been abused.⁷⁸ The rights of minor children are not affected by what it may cost to raise or educate them, but are measured by the pecuniary benefit they could reasonably expect to receive from their father during the probable continuance of his life.⁷⁹

Co., 97 Mo. 253, 259, 16 Am. Neg. Cas. 500, 501; Goss v. Missouri Pac. R. Co., 50 Mo. App. 614, 627.

⁷⁸ Lane v. Northern Pac. R. Co., 119 Minn. 258; Stohrer v. St. Louis, etc. R. Co., 91 Mo. 509, 16 Am. Neg. Cas. 500, 501; Countryman v. Fonda, etc. R. Co., 166 N. Y. 201; Douglass v. Northern Cent. R. Co., 59 App. Div. (N. Y.) 470; Rosenbaum v. Shaffner, 98 Tenn. 624; Pool v. Southern Pac. Co., 7 Utah 303, 311, 17 Am. Neg. Cas. 687, 693; White v. Australasian S. N. Co., 13 New South Wales L. R. (law) 177; St. Louis, etc. R. Co. v. McCain, 67 Ark. 377, 386; Redfield v. Oakland Con. St. R. Co., 110 Cal. 277; Baltimore & O. R. Co. v. Stanley, 54 Ill. App. 215; O'Fallon C. Co. v. Laquet, 89 id. 13; Gulf, etc. R. Co. v. Delaney, 22 Tex. Civ. App. 427; Pittsburgh, etc. R. Co. v. Burton, 139 Ind. 357, 378, 11 Am. Neg. Cas. 475; Phalen v. Rochester R. Co., 31 App. Div. (N. Y.) 448.

⁷⁹ Chicago, R. I. & P. R. Co. v. Gunn, 112 Ark. 401; McLaughlin v. United Railroads of San Francisco, 169 Cal. 494, L.R.A.1915E 1205; Chesapeake & P. Tel. Co. v. State, 124 Md. 527; Jones v. Kansas City, etc. R. Co., 178 Mo. 528, 20 Am. Neg. Rep. 674; Big Jack Min. Co. v. Parkinson, 41 Okla. 125; Fisher v. Portland Railway, Light & Power Co., 74 Ore. 229; McClaugherty v. Suth. Dam. Vol. V.—4.

Rogue River Elec. Co., 73 Ore. 135; Texas & N. O. R. Co. v. Cunningham, — Tex. Civ. App. —, 168 S. W. 428; International, etc. R. Co. v. Kuehn, 2 Tex. Civ. App. 210, 12 Am. Neg. Cas. 602, 603; Baltimore & O. R. Co. v. Hottman, 25 Ohio C. C. 140.

In a late Texas case the rule stated in the text was said to apply to adult children as well as minors, where such adults had a reasonable ground for expecting that the parent would, had he lived, rendered them pecuniary aid, thus showing a prospective financial loss due to the father's death. Damages recovered by such adult must be actual and for a pecuniary loss, which must be clearly, but not necessarily directly shown. Houston & T. C. R. Co. v. Walker, — Tex. —, 173 S. W. 208 [rev'g 167 S. W. 199].

An instruction in an action by children to recover for the death of a mother that the pecuniary value of the life of the mother was the "value in money" of such life was erroneous and therefore properly refused, for the reason that the requested instruction did not define the term "value in money." The reason given for the decision was that it might tend to confuse the jury, who unless fully advised, might not understand that the term includes elements having no real value in money, but which for want

The expense of education during minority may be regarded as well as the value of support.⁸⁰ The effect of a statute limiting the right of action for the benefit of minor children is to save the latter harmless during minority from the loss of benefits they would have received up to the time of their respective majorities had their father lived under as favorable conditions as would have existed had he not been killed. The loss of a minor who attained majority pending the suit is to be compensated for.⁸¹

The law will imply a pecuniary loss in some amount to the wife and children by the death of the husband and father who was at the time employed and presumably receiving wages, and therefore able to discharge his obligation to support them.⁸² The presumption is in favor of substantial damages;⁸³ and some damage is presumed in favor of adult children who have lost their mother.⁸⁴

Recovery may be had in behalf of a child *in ventre sa mère*

of a better method of compensation the law says shall be estimated in terms of money, such as the care of a daughter by her mother. *McLaughlin v. United Railroads of San Francisco*, 169 Cal. 494.

Evidence has been held competent that a father was wont to teach his little girl her Sunday school lessons, and wanted her to go to Sunday school, as well as making her practice her music lessons, as tending to show that the father had an affection for his children, took an interest in their welfare, and on that account would be likely to contribute to their support in the future. The father in this case did not reside with the children. *Chicago, R. I. & P. R. Co. v. Gunn*, 112 Ark. 401.

⁸⁰ *Delahunt v. United Tel. & T. Co.*, 215 Pa. 241, 20 Am. Neg. Rep. 727, 114 Am. St. 958.

⁸¹ *Eichorn v. New Orleans, etc. R., L. & P. Co.*, 114 La. 712.

⁸² *Texas Power & Light Co. v. Bird*, — Tex. Civ. App. —, 165 S. W. 8; *Bateman v. Illinois Cent. R. Co.*, 162 Ill. App. 125; *Louisville, etc. R. Co. v. Buck*, 116 Ind. 566, 9 Am. St. 883, 14 Am. Neg. Cas. 553, 11 Am. Neg. Cas. 508, 2 L.R.A. 520; *McKeigue v. Janesville*, 68 Wis. 50; *Houghkirk v. Delaware & H. C. Co.*, 92 N. Y. 219, 12 Am. Neg. Cas. 313, 44 Am. Rep. 370; *Countryman v. Fonda, etc. R. Co.*, *supra*; *Hunt v. Conner*, 26 Ind. App. 41, 50; *Kelly v. Chicago, etc. R. Co.*, 50 Wis. 381, 17 Am. Neg. Cas. 905; *Chicago v. Scholten*, 75 Ill. 468; *Chicago & N. R. Co. v. Swett*, 45 Ill. 197; *St. Louis, etc. R. Co. v. Haist*, 71 Ark. 258; *Cleveland, etc. R. Co. v. Dukeman*, 130 Ill. App. 105.

⁸³ *Dukeman v. Cleveland, etc. R. Co.*, 237 Ill. 104.

⁸⁴ *Rautman v. Chicago Con. T. Co.*, 156 Ill. App. 457.

if it is born within due time,⁸⁵ and on behalf of all the children of a deceased father who had a legal claim upon him for support.⁸⁶ In an action by the next kin to recover for the death of a person, a brother or sister of the deceased born soon after his death is an heir and a necessary party.⁸⁷

Ordinarily children are expected to survive their parents and to inherit whatever property they leave undisposed of, and to transmit their own property to their children. The mere fact that the children are all of age at the time of the parent's death does not everywhere⁸⁸ preclude them from recovering for the loss of such pecuniary benefits as they had a reasonable expectation of securing from additional accumulations had he not been injured,⁸⁹ especially if they are depend-

⁸⁵ *The George & Richard, L. R. 3* Ad. & Ecc. 466; *Roach v. Wolff*, 96 Neb. 43; *Zitnik v. Union Pac. R. Co.*, 95 Neb. 152; *Arnold v. State*, 163 App. Div. (N. Y.) 253; *Texas & N. O. R. Co. v. Cunningham*, — Tex. Civ. App. —, 168 S. W. 428; and cases cited in note to § 8. See *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242.

⁸⁶ *International, etc. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182, 1 Am. Neg. Rep. 370; *Gulf, etc. R. Co. v. Delaney*, 22 Tex. Civ. App. 427.

⁸⁷ *Chicago & A. R. Co. v. Logue*, 58 Ill. App. 142.

⁸⁸ If the deceased had not accumulated anything an expectation of inheritance by his children should not be considered. *Wiest v. Electric T. Co.*, 200 Pa. 148, 58 L.R.A. 666.

⁸⁹ *Valente v. Sierra R. Co.*, 158 Cal. 412; *Hollingsworth v. Davis-D. Estates C. Co.*, 38 Mont. 143; *Paris, etc. R. Co. v. Robinson*, 104 Tex. Civ. App. 482, 5 N. C. C. A. 622; *Rochester v. Seattle R. & S. R. Co.*, 67 Wash. 545, 39 L.R.A. (N.S.) 1156 (under ch. 129, laws 1909);

Tuteur v. Chicago, etc. R. Co., 77 Wis. 505; *Galveston, etc. R. Co. v. Puente*, 30 Tex. Civ. App. 246; *Mansfield C. & C. Co. v. McEnery*, 91 Pa. 185, 36 Am. Rep. 662, 17 Am. Neg. Cas. 237; *Redfield v. Oakland Con. St. R. Co.*, 112 Cal. 220, 228; *Chicago, etc. R. Co. v. Ptacek*, 171 Ill. 9; *Lockwood v. New York, etc. R. Co.*, 98 N. Y. 523; *Phalen v. Rochester R. Co.*, 31 App. Div. (N. Y.) 448; *Pennsylvania R. Co. v. Adams*, 55 Pa. 499; *Schnatz v. Philadelphia & R. R.*, 160 Pa. 602; *Stahler v. Same*, 199 Pa. 383; *Tyler S. R. Co. v. Raspberry*, 13 Tex. Civ. App. 185.

It is otherwise under the terms of the dramshop acts or civil damage laws of some states, the injury in person or property therein mentioned being such as is in violation of a legal right of which the plaintiff was in the actual enjoyment before and at the time of the injury thereto. *Jury v. Ogden*, 56 Ill. App. 100; *Goode v. Towns*, 56 Vt. 410, 48 Am. Rep. 799.

In *Phalen v. R. Co.*, 31 App. Div. (N. Y.) 448, the deceased was aged sixty-eight at the time of her death and was living

ent.⁹⁰ On the other hand, where damages are claimed by an adult son on account of his mother's death the jury is to consider the likelihood that she might require care and expense from him, and the amount of property owned by each as bearing upon the question of his loss.⁹¹

Evidence of the financial condition of the head of the family at the time of the death of the wife is admissible upon the issue of the pecuniary injury sustained by a child. To the extent that the aid given by the mother to the child was derived from the income of property which the latter received at the mother's death, such aid was not lost by her death. But the fact of the receipt of property is not a defense to the child's action.⁹² The last proposition is very satisfactorily dealt with in a Pennsylvania case, which is in harmony with cases elsewhere noted.⁹³ In the Pennsylvania case the fact that, as the

around among her children, some of whom afforded her pecuniary assistance. The court observed: The fact that they had dutifully done so does not detract from their right to recover damages in this action. It might well be that when sickness or misfortune should render the care or assistance of this mother necessary, she would be in a condition to render it, and this would certainly be a pecuniary benefit. But we will not indulge in anticipations of the many ways in which the jury might see how the deceased could render pecuniary aid to her sons and daughters. They had the right to that aid and to the preservation of her life as long as Providence should permit.

⁹⁰ *Young v. Beveridge*, 81 Neb. 180, citing *Rouse v. Detroit E. R. Co.*, 128 Mich. 149, 15 Am. Neg. Rep. 633; *Carpenter v. Buffalo, etc. R. Co.*, 38 Hun 116; *Fordyce v. McCants*, 51 Ark. 509, 14 Am. St. 69, 4 L.R.A. 296.

⁹¹ *Lazelle v. Newfane*, 70 Vt. 440.

⁹² *Gulf, etc. R. Co. v. Younger*, 90

Tex. 387, 1 Am. Neg. Rep. 378, modifying *San Antonio, etc. R. Co. v. Long*, 87 Tex. 148, 47 Am. St. 87, 24 L.R.A. 637; *Eichorn v. New Orleans, etc. R., L. & P. Co.*, 114 La. 712; *McLaughlin v. United Railroads of San Francisco*, 169 Cal. 494, L.R.A. 1915E 1205.

Where a mother whose husband was living at the time of her death was accustomed to contribute regularly to each of her three children, and where the evidence tended to show that such contributions would have been continued but for her death, *prima facie* a basis for the estimation of damages is made out, and if the estate of the mother, from the income of which she made the contributions, is to come to plaintiffs at the death of the father, it is a matter of defense to show the fact in mitigation of damages, so that it was immaterial whether plaintiff proved the age of the father or not. *Wescoat v. Decker*, 85 N. J. L. 716.

⁹³ § 1265.

result of the death of their father, adult children came into possession of an inheritance was held immaterial to the right or measure of recovery for his death. The question involved is similar to that which arises where the deceased had insurance on his life for the benefit of those who are entitled to recover for his death. As we have seen,⁹⁴ the courts in the United States are a unit in opposition to the idea that the wrong-doer's liability is thereby mitigated. On the question as to the effect of the inheritance upon the damages recoverable the court said: Conceding the right to recover if a loss is sustained, how do we ascertain what is a loss in the sense contemplated by the act? A son who is receiving nothing from his father living may be said to be pecuniarily benefited by the parent's death; but we have yet to learn that a railroad company by negligently causing death can in this way become the gratuitous and unsolicited benefactor of children who prefer their father living; and it is a novel proposition that a yearly allowance with a certainty of an inheritance of an estate constantly increasing in value by the parent's prudence and financial ability can be cut off by the killing of the parent, and the children be told that it is for their benefit. If that is the law, what security have the wealthy against the negligence of others? All inducements for the use of care and caution as to such are removed. The only reasons why a verdict in pure negligence cases can be justified are as an inducement appealing to self-interests to use care and caution; but these are taken away if we hold that no damages can be recovered by the children of wealthy people because they get the estate as a result of the unlawful act. As the jury were told, at request of defendant, that nothing could be allowed for the suffering of the deceased or the feelings of the surviving members of his family, and if in addition we hold that nothing can be recovered for the reason now urged, the defendant, although confessedly guilty of negligence resulting in death, suffers no loss or punishment for its unlawful act, simply because of the financial standing of the deceased. If this is law it might be well for the legislature to provide a new criminal

⁹⁴ *Id.*

offense and substitute imprisonment for damages, and thus induce the same degree of care and caution in the transportation of the rich as of the poor. It is not, however, absolutely correct to say that the mere fact of coming into the inheritance presently is a benefit peculiarly, for *non constat* that if the life had been prolonged but a week or month that the estate would not have been larger. The true question is what had these plaintiffs the right to receive from the parent during his life, and for the loss of this they are to be compensated; what they got after his death does not enter into the case. The loss spoken of is the taking away of that which they were receiving and would have received had he lived. It is the destruction of their expectations in this regard that the law deals with and for which it furnishes compensation. To say, "True it is we have taken from you his benefactions, but you get by law, not from us, but from his estate which we thus make available for you, something better," is to substitute the heirs' legal right under the law for the company's liability.⁹⁵ In Texas, as against adult children, seeking to recover for their mother's death, an inventory of her estate is competent to show what they inherited from her.⁹⁶

It has been held that the jury may take into consideration the earnings of the deceased, and that the question whether the minor children had other means of support after his death is wholly immaterial;⁹⁷ but as to this the authorities are not in accord.⁹⁸ In estimating the probable savings the deceased would have accumulated but for his death the income received from his investments, if these go to his adult children, should not be considered because they are in the immediate enjoyment of such

⁹⁵ *Stahler v. Philadelphia & R. R. Co.*, 199 Pa. 383, 85 Am. St. 791.

⁹⁶ *Rader v. Galveston, etc. R. Co.* (Tex. Civ. App.), 137 S. W. 718.

But it is otherwise in jurisdictions where a child's recovery for the death of a parent cannot be mitigated by proof that the child has thereby inherited property. *McLaughlin v. United Railroads of San Francisco*, 169 Cal. 494, L.R.A. 1915E 1205.

⁹⁷ *Heyer v. Salsbury*, 7 Ill. App. 93, 14 Am. Neg. Cas. 330; *Duke v. St. Louis, etc. R. Co.*, 172 Fed. 684.

Evidence of the number, ages and sex of the children of a widowed child of the deceased, and that he had supported them is not competent. *Cook v. Cleveland, etc. R. Co.*, 143 Ill. App. 109.

⁹⁸ *Ronson v. Canadian Pac. R. Co.*, 18 Ont. L. R. 337 (Court of Appeal).

income.⁹⁹ The consideration of any prospective inheritance that might have been reasonably expected to be derived from the deceased has been considered too uncertain to be the basis of an award. Following the language of the supreme court of the United States¹ it has been held that the consideration of pecuniary benefits from the deceased must be limited to such as the next of kin had a reasonable expectation of receiving while he lived.² "The property, wealth, helplessness or dependence of the lineal next of kin is immaterial on the question of the amount of recovery."³ Where the action must be brought for the benefit of the estate, the number and ages of the family are not material, where the relation is lineal, as the sole measure of damages is the pecuniary loss—that is, how much would the deceased, in all probability, have added to the estate had he lived, which amount would not be affected by the number or ages of such kindred, as each would only get his proportionate share as provided by law for the distribution of the personal property of an intestate without being increased or diminished as to any one of them on account of poverty, age, physical condition,⁴ character or habits.⁵

The damages may, in some states, include compensation for the loss of physical care, moral and mental training, where the

⁹⁹ *Denver, etc. R. Co. v. Spencer*, 25 Colo. 9, citing *Grand Trunk R. Co. v. Jennings*, L. R. 13 App. Cas. 800; *Pym v. Great Northern R. Co.*, 2 B. & S. 759, 4 id. 396.

¹ *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 39 L. ed. 624, 13 Am. Neg. Cas. 803.

² *Baltimore & P. R. Co. v. Golway*, 6 App. Cas. (D. C.) 143, 180; *Eichorn v. New Orleans, etc. R., L. & P. Co.*, 114 La. 712. *Contra*, *Baltimore & O. R. Co. v. Hottman*, 25 Ohio C. C. 140; *New York, etc. R. Co. v. Roe*, id. 628, following *Grottenkemper v. Harris*, 25 Ohio St. 510. The statute authorizes such damages as the jury may think proportioned to the pecuniary injury resulting from the death.

³ *Chicago, etc. R. Co. v. Woolridge*, 174 Ill. 330, 335; *Fox v. Oakland Con. St. R. Co.*, 118 Cal. 55, 62 Am. St. 216. *Contra*, *St. Louis S. R. Co. v. Bowles*, 32 Tex. Civ. App. 118.

⁴ *Chicago, etc. R. Co. v. Woolridge*, *supra*; *Bradley v. Ohio River R. Co.*, 122 N. C. 972.

⁵ *McClagherty v. Rogue River Elec. Co.*, 73 Ore. 135, holding that evidence of the drinking habits of plaintiff, a son suing for the death of a father, was incompetent as tending to prejudice the jury and influence the amount of recovery on account of the probable manner in which plaintiff would expend the amount recovered.

parent was fitted to furnish such training, for this is among the most important of parental duties.⁶ But it should be shown that

⁶ *McLaughlin v. United Railroads of San Francisco*, 169 Cal. 494, L.R.A. 1915E 1205; *Crabbe v. Mammoth Channel Gold Min. Co.*, 168 Cal. 500; *Wabash R. Co. v. Gretzinger*, 182 Ind. 155; *Texas Power & Light Co. v. Bird*, — Tex. Civ. App. —, 165 S. W. 8; *Texas & N. O. R. Co. v. Cunningham*, — Tex. Civ. App. —, 168 S. W. 428; *Cain v. Southern R. Co.*, 199 Fed. 211; *Gentry v. Wabash R. Co.*, 172 Mo. App. 638; *Missouri, etc. R. Co. v. West*, 38 Okla. 581; *St. Louis, etc. R. Co. v. Geer* (Tex. Civ. App.), 149 S. W. 1178; *Duke v. St. Louis, etc. R. Co.*, 172 Fed. 684 (ruled under the Federal Employers' Liability Act of 1908, providing that the recovery shall inure to the benefit of the family of the decedent); *International, etc. R. Co. v. McVey* (Tex. Civ. App.), 81 S. W. 991; *St. Louis, etc. R. Co. v. Mathis*, 76 Ark. 184, 113 Am. St. 85; *Goddard v. Enzler*, 123 Ill. App. 108; *Gamaache v. Johnston T. F. & M. Co.*, 116 Mo. App. 596; *Wood v. Omaha*, 87 Neb. 213 (in so far as the advice and companionship are of pecuniary value); *Texas & N. O. R. Co. v. Walker*, 58 Tex. Civ. App. 615; *Omaha W. Co. v. Schamel*, 78 C. C. A. 68, 147 Fed. 502; *Hall v. North Pacific Coast R. Co.*, 134 Fed. 309; *St. Louis, etc. R. Co. v. Standifer*, 81 Ark. 275; *Peters v. Southern Pac. Co.*, 160 Cal. 48; *Johnson v. Southern Pac. R. Co.*, 154 Cal. 285; *Goddard v. Enzler*, 222 Ill. 462 aff'g 123 Ill. App. 108; *Cleveland, etc. R. Co. v. Starks*, 174 Ind. 345; *Indianapolis T. & T. Co. v. Romans*, 40 Ind. App. 184; *Eichorn v. New Orleans, etc. R., L. & P. Co.*, 114 La. 712; *Sipple v. Laclede G. Co.*, 125 Mo. App. 81 (though the parents were

divorced and the custody of the child was awarded the mother); *Carter v. West Jersey & S. R. Co.*, 76 N. J. L. 602, 19 L.R.A.(N.S.) 128 (under a statute allowing such damages as shall seem fair and just with reference to the pecuniary injury there may be a recovery by children who lived with their parents for the death of their mother who performed the household duties without proof that they would probably have received financial aid from her); *Pittsburgh, etc. R. Co. v. Dooley*, 13 Ohio C. C. (N.S.) 225; *Whaley v. Vidal*, 27 S. D. 627; *O'Grady v. Union Stock Yards Co.*, 90 Neb. 138; *Gray v. Phillips*, 54 Tex. Civ. App. 148; *St. Lawrence & O. R. Co. v. Lett*, 11 Can. Sup. Ct. 422 (two judges dissented); *Houston, etc. R. Co. v. Davenport*, 102 Tex. 369; *St. Louis & S. F. R. Co. v. Duke*, 112 C. C. A. 564, 192 Fed. 306; *Ittner B. Co. v. Ashby*, 198 Ill. 562; *Board of Com'rs v. Legg*, 93 Ind. 523, 47 Am. Rep. 390; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287, 5 Am. Neg. Cas. 97; *Tilley v. Hudson River R. Co.*, 29 N. Y. 252; *Baltimore, etc. R. Co. v. Wightman*, 29 Gratt. 431, 10 Am. Neg. Cas. 367, 26 Am. Rep. 384; *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290; *Galveston, etc. R. Co. v. Puente*, 30 Tex. Civ. App. 246; *Redfield v. St. R. Co.*, 112 Cal. 220, 228; *Baltimore & O. R. Co. v. Stanley*, 54 Ill. App. 215; *McGowan v. St. Louis O. & S. Co.*, 109 Mo. 518, 533; *Hoadley v. International P. Co.*, 72 Vt. 79, 84; *Hunt v. Conner*, 26 Ind. App. 41; *Pittsburgh, etc. R. Co. v. Burton*, 139 Ind. 357, 11 Am. Neg. Cas. 475; *Gulf, etc. R. Co. v. Younger*, 90 Tex.

the father was capable of fulfilling this duty.⁷ That is done by proof that he was careful, painstaking, industrious, temperate and trustworthy, and possessed good business qualifications.⁸

387; *St. Louis, etc. R. Co. v. Haist*, 71 Ark. 258; *Pool v. Southern Pac. Co.*, 7 Utah 303, 17 Am. Neg. Cas. 687, 693; *Chilton v. Union Pac. R. Co.*, 8 Utah 47, 17 Am. Neg. Cas. 695; *Sternfels v. Metropolitan St. R. Co.*, 73 App. Div. (N. Y.) 494. *Contra*, *Bradley v. Ohio River & C. R. Co.*, *supra*. See *infra*, this section for the rule in Michigan and New Jersey.

In Texas such loss need not be specially pleaded, and the general allegation of damages, with an allegation that the father supported and cared for the child, is sufficient. *Texas Power & Light Co. v. Bird*, — Tex. Civ. App. —, 165 S. W. 8.

"In every person's life are matters of actual value to him which form no part of his estate and have no market value. The education and training which children may reasonably expect to receive from a parent are of actual and commercial value to them as better fitting them to obtain an income or estate. The loss of that education and training through the death of the parent from the fault of a defendant would be in the statute sense a pecuniary injury." *McKay v. New England D. Co.*, 92 Me. 454.

In *Northern Pac. R. Co. v. Freeman*, 27 C. C. A. 457, 83 Fed. 82, a charge that, in fixing the damages, the jury might regard the deceased's ability to earn money to support, maintain, care for, and protect his wife and children, and to educate and train the latter, "and the loss to the wife and children because of being deprived of the use and comforts of his society, and the loss of

his experience, knowledge and judgment in managing his and their affairs," etc., was sustained as against an objection that it allowed a recovery for sentimental damages; it covered a loss of society in the material and pecuniary sense only.

But compare *Fisher v. Portland Railway, Light & Power Co.*, 74 Ore. 229, holding that under the Oregon Employer's Liability Act [Laws 1911, p. 16] which creates a new cause of action, and does not revive a right, loss of the society of a father cannot be an element in the damages recovered by a son for the father's death.

⁷ *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290; *Chicago, etc. R. Co. v. Austin*, 69 Ill. 426; *Texas & P. R. Co. v. Gullett* (Tex. Civ. App.), 134 S. W. 262.

⁸ *Railway Co. v. Sweet*, 60 Ark. 550; *St. Louis, etc. R. Co. v. Standifer*, 81 Ark. 275. See *Godard v. Enzler*, 123 Ill. App. 108. See *Wabash R. Co. v. Gretzinger*, 182 Ind. 155, where it is said that in the face of evidence that a father is sober and industrious, and has intelligence enough to enable him to hold a responsible position, together with the fact that he contributed the larger portion of his earnings to his family, the objection that it was not shown that he was able to give his child proper parental care, training, advice or guidance is hypercritical.

Evidence that deceased was a church member has been held competent on the question of damages for the loss of the parent's moral

Where the deceased was aged fifty-three years, and supported herself, as did her two adult children, the court said: It is for the jury to consider if the health of the daughter should fail whether the mother might not take her to her own home, nurse and care for her indefinitely. The same might be true of the son. In other words, they are permitted to consider in a reasonable way those prospective and indefinite damages arising from the death of a mother under these circumstances, in addition to the actual money damages as proved.⁹ The compensation for loss of care and training should not extend beyond the period of the child's minority according to at least one court,¹⁰ but the rule is not so limited in several states.¹¹ It has been adjudged that married minors may not recover for the loss of the advice and counsel of a parent after their marriage, though their right anterior thereto is recognized.¹² If the action is to be considered as brought for the benefit of the estate of the decedent, the loss of parental care is not an element of damage.¹³ In Michigan and New Jersey a recovery for the loss of counsel and advice is confined to narrower limits than in most other states. It is said to be distinctly against the rule in the former state to allow the consideration of that element of damage on the ground that the jury might roam at large and draw upon their imagination as to the extent of the injury suffered.¹⁴ Where the most that could be inferred was that the father rendered occasional assistance to his children in their studies, such as a

training of his children. *White's Adm'x v. Central R. Co.*, 87 Vt. 330.

It is presumed in the absence of evidence to the contrary that the average father is of value to his children in this respect, but the value cannot be proved by expert testimony. The jury are as capable of estimating such value as any witness. *Texas Power & Light Co. v. Bird*, — Tex. Civ. App. —, 165 S. W. 8.

⁹ *Countryman v. Fonda, etc. R. Co.*, 166 N. Y. 201, 209.

¹⁰ *Baltimore & P. R. Co. v. Golway*, 6 App. Cas. (D. C.) 143, 177.

¹¹ *Tilley v. R. Co.*, 29 N. Y. 252; *Hollingsworth v. Davis-D. Estate C. Co.*, 38 Mont. 143; *Butte E. R. Co. v. Jones*, 18 L.R.A. (N.S.) 1205, 90 C. A. 240, 164 Fed. 308 (held competent to show that the deceased intended and was able to send her son to college); *Redfield v. Oakland Con. St. R. Co.*, 110 Cal. 277.

¹² *Texas, etc., R. Co. v. Mills* (Tex. Civ. App.), 143 S. W. 690.

¹³ *McCabe v. Narragansett E. L. Co.*, 27 R. I. 272.

¹⁴ *Walker v. Lake Shore, etc. R. Co.*, 104 Mich. 606, 617, 16 Am. Neg. Cas. 143, 1 Am. Neg. Rep. 267.

parent is supposed to render, but which, in its very nature, is as incapable of measurement by a pecuniary standard as is the loss of love, affection and sympathy, such assistance was not an element of the damage.¹⁵ In New Jersey there cannot be a recovery because of the loss of the advice and counsel of the deceased unless it is shown they would have been given concerning the pecuniary affairs of the next of kin and would probably have resulted in a pecuniary benefit, and that the loss of the advice and counsel will probably result in a pecuniary injury.¹⁶ Adult sons cannot recover for the loss of such benefit as they derived from the credit, capital, skill and reputation of their father as a member of a partnership with them. "The injury thus resulting is not within the scope of the statute, which gives damages for injuries resulting from the severance of a relation of kinship, and not of contract."¹⁷ The loss of the services of a mother as a housekeeper is an element of pecuniary damage.¹⁸ If some of the children of the deceased are in poor health the fact may be shown, although others of them who are in good health may be benefited by the evidence.¹⁹ In Michigan only children legally entitled to support can recover damages.²⁰ In the absence of special circumstances adult, nondependent children can recover but little more than nominal damages unless proof of pecuniary loss is made.²¹ In some cases it is held that it is for the jury to find whether, according to the evidence of parental affection for minor children, aid and support might be given after their majority was reached.²² Under the Illinois dram-shop statute the recovery by minors for the death of their

¹⁵ Same case, 111 Mich. 518.

¹⁶ *May v. West Jersey & S. R. Co.*, 62 N. J. L. 63, 5 Am. Neg. Rep. 417.

¹⁷ *Demarest v. Little*, 47 N. J. L. 28, 16 Am. Neg. Cas. 643, 668.

In Louisiana a child may recover for the material and moral benefits which would have been received had the parent lived up to the time of her majority, including his training and advice and the pleasure and comfort of his society. *Bourdier v. Louisiana W. R. Co.*, 133 La. 50.

¹⁸ *Cleveland, etc. R. Co. v. Dukeman*, 130 Ill. App. 105.

¹⁹ *McKeigue v. Janesville*, 68 Wis. 50; *Hunt v. Conner*, 26 Ind. App. 41, 55.

²⁰ *Rouse v. Detroit E. R.*, 128 Mich. 149, 15 Am. Neg. Rep. 633.

²¹ *Rudon v. San Juan L. & T. Co.*, 4 Porto Rico Fed. 515 (the statute allows the recovery of such damages as may be just).

²² *Kansas City S. R. Co. v. Frost*, 93 Ark. 183; *Butte E. R. Co. v.*

father is not affected because they have joined in an action therefor; it is immaterial to the defendant how the sum recovered is to be divided among them, and he cannot lessen his liability on the theory that the damages are limited until such time as the oldest plaintiff may become of full age.²³ It is immaterial to the rights of a child that his father had abandoned him, refused to support him and declared his purpose not to do so.²⁴ The measure of recovery is not affected because the action was barred as to one of the persons entitled to sue.²⁵ The loss of a home by a child dependent upon his mother's earnings for the means of his education and her intention to send him to college and the fact that she had earned money to do so may be shown under a statute allowing the recovery of such damages as may be just.²⁶ The computation of damages is to be made from the time of the death of the parent, though the injury which caused death totally disabled the parent some time before she died.²⁷ In Pennsylvania an adult son who had not been a member of his mother's household for several years may not recover for her death in the absence of evidence showing the amount and sources of her bounty, her manner of life and habits of expenditure. It is not otherwise because the persons who paid her funeral expenses expected him to reimburse them.²⁸

§ 1268. Facts and circumstances to be considered in estimate of damages. These are the age, sex, health condition in life,

Jones, 164 Fed. 308, 18 L.R.A. (N.S.) 1205 (the statute provides for the recovery of such damages as may be just).

Though the statute provides for the forfeiture of a sum which the jury may fix within stated limits, evidence that a father had given and would continue to give support to his minor children is admissible. *Williams v. Chicago, etc. R. Co.*, 169 Mo. App. 468.

²³ *Peters v. Kamiczaitis*, 161 Ill. App. 575.

²⁴ *Gulf, C. & S. F. Ry. Co. v. An-*

derson (Tex. Civ. App.), 126 S. W. 928, citing local cases. See § 1265, and ch. 40, *post* relative to actions under the Federal Employers' Liability Act.

²⁵ *Paris, etc. R. Co. v. Robinson*, 104 Tex. Civ. App. 482, 5 N. C. C. A. 622.

²⁶ *Butte E. R. Co. v. Jones*, 164 Fed. 308, 18 L.R.A. (N.S.) 1205.

²⁷ *Atlanta & W. P. R. Co. v. Venable*, 67 Ga. 697.

²⁸ *Vining v. Rexford*, 201 Fed. 904.

occupation, habits of industry and sobriety, mental and physical capacity, disposition to frugality, opportunities and customary earnings of the deceased and the use made of them and his expectation of life.²⁹ In addition, the age, circumstances, con-

²⁹ *Railways Ice Co. v. Howell*, — Ark. —, 174 S. W. 241; *Big Jack Min. Co. v. Parkinson*, 41 Okla. 125; *Louisville & N. R. Co. v. Morris*, *infra*; *Citizens' L., H. & P. Co. v. Lee*, 182 Ala. 561; *Bateman v. Illinois Cent. R. Co.*, 162 Ill. App. 125; *McCoullough v. Chicago, etc. R. Co.*, 160 Iowa 524, 47 L.R.A.(N.S.) 23; *Gulf, etc. R. Co. v. Beezley* (Tex. Civ. App.), 153 S. W. 651; *Serdan v. Falk Co.*, 153 Wis. 169; *Pulaski G. L. Co. v. McClintock*, 97 Ark. 576, 32 L.R.A.(N.S.) 825; *Bond v. United R.*, 159 Cal. 270; *Cleveland, etc. R. Co. v. Starks*, 174 Ind. 345; *Swanson v. Union S. Co.*, 89 Neb. 361; *Freeman v. McElroy* (Tex. Civ. App.), 126 S. W. 657; *Brennen v. Chicago & C. C. Co.*, 241 Ill. 610 (disposition made of earnings); *Woodstock I. Works v. Kline*, 149 Ala. 391; *Galveston, etc. R. Co. v. Harris* (Tex. Civ. App.), 36 S. W. 776; *Jones v. Kansas City, etc. R. Co.*, 178 Mo. 528, 20 Am. Neg. Rep. 674; *Buck v. Maddock*, 167 Ill. 219; *Duke v. St. Louis, etc. R. Co.*, 172 Fed. 684 (in the last case the business ability and the health of the decedent are especially dealt with); *Houston v. Quinn*, 168 Ill. App. 593 (action under dram shop statute); *Morton v. Smith H. Co.*, 152 App. Div. (N. Y.) 738 (emphasizing the absence of evidence as to the use made of decedent's earnings); *Duke v. St. Louis, etc. R. Co.*, 172 Fed. 684; *Ward v. Dampskibsselskabet Kjoebenhaven*, 144 Fed. 524; *The Charlotte*, 124 Fed. 989; *Kansas City S. R. Co. v. Frost*, 93 Ark. 183; *Choctaw, etc. R. Co. v. Dougherty*, 77

Ark. 1; *St. Louis, etc. R. Co. v. Hitt*, 76 Ark. 227; *Denver, etc. R. Co. v. Gunning*, 33 Colo. 280; *Pittsburgh, etc. R. Co. v. Sudhoff*, 173 Ind. 314; *Falender v. Blackwell*, 39 Ind. App. 121; *Louisville & N. R. Co. v. Massie*, 138 Ky. 449; *Cox v. L. & N. R. Co.*, 137 Ky. 388; *Louisville & N. R. Co. v. Daniel*, 122 Ky. 256, 3 L.R.A.(N.S.) 1190 (habits of industry and sobriety or the converse thereof as held in *Cleveland & P. R. Co. v. Sutherland*, 19 Ohio St. 151); *McVeigh v. Minneapolis, etc. R. Co.*, 113 Minn. 450; *Williams v. Metropolitan St. R. Co.*, 141 Mo. App. 625; *Nilson v. Chicago, etc. R. Co.*, 84 Neb. 595, 4 N. C. C. A. 651; *O'Doherty v. Postal Tel.-C. Co.*, 134 App. Div. (N. Y.) 298; *Hinsdale v. New York, etc. R. Co.*, 81 App. Div. (N. Y.) 617; *Poe v. Railroad*, 141 N. C. 525; *Carter v. Railroad*, 139 N. C. 499; *Watson v. Seaboard A. L. R. Co.*, 133 N. C. 188; *Buckman v. Philadelphia & R. R. Co.*, 227 Pa. 277; *Memphis St. R. Co. v. Berry*, 118 Tenn. 581; *Galveston, etc. R. Co. v. Mitchell*, *infra*; *Ryan v. Oshkosh G. L. Co.*, 138 Wis. 466; *Yeager v. Chicago, etc. R. Co.*, 156 Iowa 166; *Barboza v. Pacific P. C. Co.*, 162 Cal. 36; *St. Louis, etc. R. Co. v. Hutchinson*, 101 Ark. 424, 4 N. C. C. A. 443; *Railway Co. v. Sweet*, 60 Ark. 550, citing the text; *Marschall v. Laughran*, 47 Ill. App. 29; *Wright v. Crawfordsville*, 142 Ind. 636 (evidence of specific intoxications of deceased admissible); *Wheelan v. Chicago, etc. R. Co.*, 85 Iowa 167, 178, 14 Am. Neg. Cas. 656; *Lowe v. Same*, 89 Iowa 420, 14

dition and relation of the party or parties for whose benefit the

Am. Neg. Cas. 654; *Spaulding v. Same*, 98 Iowa 205, 219; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 553, 13 Am. Neg. Cas. 60; *Same v. Graham*, 98 Ky. 688, 15 Am. Neg. Cas. 203 (applying the law of Alabama); *Schaub v. Hannibal, etc. R. Co.*, 106 Mo. 74, 93, 16 Am. Neg. Cas. 494; *McGowan v. St. Louis O. & S. Co.*, 109 Mo. 518, 533; *Anderson v. Chicago, etc. R. Co.*, 35 Neb. 95; *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181, 13 Am. Neg. Cas. 139; *Lockwood v. New York, etc. R. Co.*, 98 N. Y. 523; *Lustig v. Same*, 65 Hun 547, 5 Am. Neg. Cas. 536; *Coley v. Statesville*, 121 N. C. 301, 307; *Benton v. North Carolina R. Co.*, 122 N. C. 1007; *Mendenhall v. Same*, 123 N. C. 275; *Carlson v. Oregon S. L. R. Co.*, 21 Ore. 450, 17 Am. Neg. Cas. 230; *McHugh v. Schlosser*, 159 Pa. 480, 39 Am. St. 699; *English v. Southern Pac. Co.*, 13 Utah 407, 422, 12 Am. Neg. Cas. 626, 57 Am. St. 772, 35 L.R.A. 155; *Louisville, etc. R. Co. v. Clarke*, 152 U. S. 230, 242, 38 L. ed. 422, 425; *Hunt v. Kile*, 38 C. C. A. 641, 98 Fed. 49; *Broughel v. Southern New England Tel. Co.*, 73 Conn. 614; *Louisville & N. R. Co. v. Morgan*, 114 Ala. 449, 458; note, 48 Am. Dec. 639; *Louisville, etc. R. Co. v. Stacker*, 86 Tenn. 343, 353, 17 Am. Neg. Cas. 443, 6 Am. St. 840; *Holmes v. Oregon, etc. R. Co.*, 6 Sawyer 262, 5 Fed. 75; *Taylor v. Western Pac. R. Co.*, 45 Cal. 323, 13 Am. Neg. Cas. 349; *Macon, etc. R. Co. v. Johnson*, 38 Ga. 409, 11 Am. Neg. Cas. 292; *Central R. Co. v. Thompson*, 76 Ga. 770, 782; *Chicago v. Scholten*, 75 Ill. 468; *Chicago, etc. R. Co. v. Moranda*, 93 id. 302, 14 Am. Neg. Cas. 362; *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa

280, 87 Am. Dec. 391; *State v. Cecil County Com'rs*, 54 Md. 426; *Shaber v. St. Paul, etc. R. Co.*, 28 Minn. 103; *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409; *Telfer v. Northern R. Co.*, 30 N. J. L. 188, 12 Am. Neg. Cas. 275; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287, 5 Am. Neg. Cas. 97; *Kesler v. Smith*, 66 N. C. 154; *Burton v. Wilmington, etc. R. Co.*, 82 id. 504; *Catawissa R. Co. v. Armstrong*, 52 Pa. 282; *Mansfield C. & C. Co. v. McEnery*, 91 id. 185, 36 Am. Rep. 662, 17 Am. Neg. Cas. 237; *Nashville, etc. R. Co. v. Prince*, 2 Heisk. 580; *Baltimore, etc. R. Co. v. Wightman*, 29 Gratt. 431, 10 Am. Neg. Cas. 367, 26 Am. Rep. 384; *Atchison, etc. R. Co. v. Wilson*, 48 Fed. 57; *Oakes v. Maine Cent. R. Co.*, 95 Me. 103; *Pittsburgh, etc. R. Co. v. Parish*, 28 Ind. App. 189; *Standlee v. St. Louis, etc. R. Co.*, 25 Tex. Civ. App. 340; *Coffeyville M. & G. Co. v. Carter*, 65 Kan. 565, 12 Am. Neg. Rep. 594. See § 455, as to life and annuity tables as evidence.

In an action by a child under a civil damage statute to recover for the loss of means of support caused by the death of the father the habits of the latter are quite material. *Lee v. Hederman*, 158 Iowa 719.

The earning capacity of the deceased is not the only matter to be weighed if his services were valuable in assisting in work about his home and premises. *International, etc. R. Co. v. McVey* (Tex. Civ. App.), 81 S. W. 991.

The age of the deceased, his life expectancy and earning capacity are ample facts on which to base a verdict. *Archibald v. Lincoln County*, 50 Wash. 55.

The value of the decedent's busi-

action was brought to the deceased are involved.³⁰ While the age and earnings of the decedent are to be the chief guide to the jury,³¹ they may determine from other facts in evidence whether his ability to earn money would have increased or decreased, and may fix the amount of their verdict in the light of the probability.³² It is not improper to consider the

ness as an insurance agent may be shown. *Wheeling, etc. R. Co. v. Parker*, 9 Ohio C. C. (N.S.) 28.

There is a prima facie presumption that the deceased was able to support his family. *Hall v. North Pac. Coast R. Co.*, 134 Fed. 309.

The inevitable death of the deceased from natural causes within a short time may be shown in mitigation. *Meekins v. Railroad Co.*, 134 N. C. 217.

The fact that deceased had a father who was assisting him to get a start in life is incompetent in mitigating the damages to be recovered by the wife for his death, as such fact is an asset and not a liability. *Roach v. Wolff*, 96 Neb. 43.

³⁰ *Ft. Worth & D. C. Ry. Co. v. Stalcup*, — Tex. App. Div. —, 167 S. W. 279; *Hovey v. New England N. Co.*, 83 Conn. 278; *De Luna v. Union R. Co.*, 130 App. Div. (N. Y.) 386; *Goodes v. Lansing & S. T. Co.*, 150 Mich. 494; *The Dauntless*, 121 Fed. 420.

³¹ *Korab v. Chicago, R. I. & P. R. Co.*, 165 Iowa 1; *Zitnik v. Union Pac. R. Co.*, 95 Neb. 152; *McDonnell v. Central D. Co.*, 170 Mich. 291; *Cincinnati T. Co. v. Kettler*, 11 Ohio C. C. (N.S.) 516; *Wagner v. Clausen B. Co.*, 146 App. Div. (N. Y.) 70; *Erie R. Co. v. McCormick*, 3 Ohio C. C. (N.S.) 652, 15 Am. Neg. Rep. 162; *Halverson v. Seattle E. Co.*, 35 Wash. 600; *Freeman v. Grieve* (Tex. Civ. App.), 143 S. W. 730.

In proving the amount of wages earned by decedent, where primary evidence is not shown to be available, it is competent to prove them by an estimate by a witness conversant with the earning capacity of deceased though such estimates were not based on any books, nor does it appear that deceased ever kept any books. *Galveston, H. & S. A. Ry. Co. v. Pennington*, — Tex. Civ. App. —, 166 S. W. 464.

³² *Graham v. Allen & Nelson Mill Co.*, 78 Wash. 589; *Louisville & N. R. Co. v. Morris*, 179 Ala. 239; *Armstrong v. Union S. Y. Co.*, 93 Neb. 258; *Savannah E. Co. v. Bell*, 124 Ga. 663; *Austin v. Metropolitan St. R. Co.*, 108 App. Div. (N. Y.) 249; *Carter v. Railroad*, 139 N. C. 499; *Galveston, etc. R. Co. v. Mitchell*, 48 Tex. Civ. App. 381; *Texas & P. R. Co. v. Johnson*, 48 Tex. Civ. App. 135; *Diller v. Northern California P. Co.*, 162 Cal. 531; *Whaley v. Vidal*, 27 S. D. 642; *Beecher v. Long Island R. Co.*, 53 App. Div. (N. Y.) 324; *International & G. N. R. Co. v. Ormond*, 64 Tex. 485; *East Line, etc. R. Co. v. Smith*, 65 id. 167; *Geary v. Metropolitan St. R. Co.*, 73 App. Div. (N. Y.) 441. Compare *Brown v. Chicago, etc. R. Co.*, 64 Iowa 652.

Where it is apparent that at the time of decedent's death he had reached his maximum earning power, a recovery of an amount which, if put at interest at the legal rate, would yield a greater annual income than decedent could earn if

decendent's fair prospects of promotion in his calling;³³ but evidence as to an advance in salary is not admissible if it is based on the future state of the business of the employer.³⁴ Evidence as to earnings is not necessarily confined to the sum being earned immediately before death, though such evidence is competent;³⁵ proof may be made of wages actually earned by an employee in a non-political position, for which he had demonstrated his fitness, which go to make up his average earnings within a reasonable period of time prior to his death.³⁶

he worked every day in the year is excessive. *Graham v. Allen & Nelson Mill Co.*, 78 Wash. 589.

The schedule of wages paid by the defendant for such services as the deceased rendered is admissible. *Atlantic C. L. R. Co. v. Jones*, 132 Ga. 189.

In the absence of evidence as to the earnings of the deceased the amount expended per year for the support of his family may be shown. *Memphis C. G. & E. Co. v. Letson*, 68 C. C. A. 453, 19 Am. Neg. Rep. 510, 135 Fed. 969.

An award of substantial damages may rest upon evidence showing that a physician engaged in the practice of his profession was strong and in the prime of life. *Evarts v. Santa Barbara C. R. Co.*, 3 Cal. App. 712.

The number and the ages of the children cared for by a mother is evidence of her earning capacity. *Lord v. Manchester St. R. Co.*, 74 N. H. 295.

A witness who knows what the average earnings of the decedent was may testify thereto. *Chicago & E. R. Co. v. Ponn*, 191 Fed. 682.

Opinions are admissible to show the decedent's earning capacity. *Yergy v. Helena L. & R. Co.*, 39 Mont. 213.

Where the relation of the de-

cedent to the plaintiff is shown and his obligation, disposition and ability to earn wages or conduct business, and care for, support, advise and protect him, the extent of the loss is for the jury. *Pittsburgh, etc. R. Co. v. Burton*, 139 Ind. 357; *Indianapolis T. & T. Co. v. Romans*, 40 Ind. App. 184.

³³ *Railways Ice Co. v. Howell*, — Ark. —, 174 S. W. 241; *Korab v. Chicago, R. I. & P. R. Co.*, 165 Iowa 1; *Meck v. Nebraska Tel. Co.*, 96 Neb. 539; *Arnold v. State*, 163 App. Div. (N. Y.) 253; *Fort Worth & D. C. Ry. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279; *St. Louis, etc. R. Co. v. Jacks*, 105 Ark. 347; *Missouri, etc. R. Co. v. Henderson* (Tex. Civ. App.), 148 S. W. 822; *Warren, etc. R. Co. v. Waldrop*, 93 Ark. 127; *Choctaw, etc. R. Co. v. Doughty*, 77 Ark. 1; *Cox v. L. & N. R. Co.*, 137 Ky. 388; *Douglass v. Northern Cent. R. Co.*, 59 App. Div. (N. Y.) 470; *Geary v. Metropolitan St. R. Co.*, 73 App. Div. (N. Y.) 441.

³⁴ *Fajardo v. New York Cent.*, etc. R. Co., 84 App. Div. (N. Y.) 354.

³⁵ *Reiter-C. Mfg. Co. v. Hamlin*, 144 Ala. 192; *Central R. Co. v. Alexander*, 144 Ala. 257.

³⁶ *Central R. v. Perkerson*, 112 Ga. 923, 53 L.R.A. 210; *Grimmelman v. Union Pac. R. Co.*, 101 Iowa 74, 1 Am. Neg. Rep. 237.

The testimony as to earnings and the capacity to earn may take a wide range, as the preceding notes show; the question may not be gone into fully here for obvious reasons. As further illustrating the scope the evidence may take, it will suffice to call attention to two cases: It may be shown that the decedent was skilled in trades other than the one in which he was engaged when killed, and what he could earn in the State in which he then was or elsewhere, at any of his several trades, if none of them were not permanently abandoned because of incapacity or for other reason;³⁷ it may also be shown that he had entered into an engagement for future service on the basis of a fixed compensation and a percentage of the profits, the testimony as to the latter being based upon his earnings in a like employment the previous year.³⁸

Evidence as to the income of the deceased for a particular period is proper; it tends, in connection with other evidence, to show the extent of the loss sustained.³⁹ If the deceased lived on his income and his earning power is not proven, it is proper to consider his skill in the management of money, or his capacity to manage affairs so as to benefit an estate.⁴⁰ The custom-

The testimony may cover the health, character and earning capacity of the decedent back to his young manhood. *Grand Trunk W. R. Co. v. Reddick*, 88 C. C. A. 80, 160 Fed. 898.

³⁷ *Alabama S. & W. Co. v. Griffin*, 149 Ala. 423; *Christian v. Columbus & R. R. Co.*, 90 Ga. 124.

³⁸ *Puget Sound N. Co. v. Lavan-der*, 87 C. C. A. 655, 160 Fed. 851.

³⁹ *Louisville, etc. R. Co. v. Clarke*, 152 U. S. 230, 242, 38 L. ed. 422, 425; *Wrightsville & T. R. Co. v. Gornto*, 129 Ga. 204; *Peters v. Southern Pac. Co.*, 160 Cal. 48.

The jury must not be confined to the consideration of the earnings of the deceased in any particular period. *Burns v. Pennsylvania R. Co.*, 219 Pa. 225.

⁴⁰ *Skottowe v. Oregon S. L., etc. R. Suth. Dam. Vol. V.—5.*

Co., 22 Ore. 430, 451, 16 L.R.A. 593, 10 Am. Neg. Cas. 44.

A similar rule was applied where deceased conducted a livery stable and where there was no definite evidence as to his earning capacity, or that he had been accustomed to work for wages. In such case evidence that deceased was industrious, and was not materially less capable of earning money than the average man of his age was held competent, together with the fact that he had accumulated property to the amount of \$1,300, and had \$2,500 in life insurance. *Bettinger v. Loring*, 168 Iowa 103.

"Income from investments alone cannot be considered, but every fact bearing upon the capacity of the deceased, whatever his occupation, is admissible and cannot be excluded

ary earnings of the deceased are not to be shown by proof of the profits of a partnership of which he was a member, and which employed several thousand dollars of capital,⁴¹ especially if he did not give his personal attention to the firm business.⁴² "The personal services of a skilled farmer are worth more than the mere manual labor he may perform. His judgment, skill and experience, gained by a long life of successful toil, should be also considered, and none are better qualified to give such an estimate than those who know him, and are themselves farmers of character and experience."⁴³ But it is not competent to show the minimum value of crops raised by a deceased farmer in any years or years.⁴⁴ It has been held that it is not essential to a recovery that evidence be offered of the pecuniary value of the services performed by the deceased or of the profits which he derived from his business, the other facts enumerated being shown, and, in addition, the age, sex, circumstances and condition in life of the next of kin.⁴⁵ But in the absence of proof showing the earning power or habits of industry of the deceased it is error to charge that the pecuniary loss may be estimated from his age, health and habits.⁴⁶ In Kentucky it is said to be the well settled doctrine that the single criterion by which to measure compensatory damages is the power of the deceased to earn money, inquiry as to the probable duration of his life being merely incidental.⁴⁷ Conceding the pertinency of the facts indicated the jury are not bound to decide what the

merely because the particular ability was to accumulate money by the use of money." *Boyce v. New York City R. Co.*, 126 App. Div. (N. Y.) 248.

Accumulating capacity is not shown by proof of the amount realized from a policy on the life of the deceased. *Nevers L. Co. v. Fields*, 151 Ala. 367.

⁴¹ *McCracken v. Traction Co.*, 201 Pa. 384.

⁴² *Read v. Brooklyn Heights R. Co.*, 32 App. Div. (N. Y.) 503. See § 1246.

⁴³ *McLamb v. Wilmington & W. R.*

Co., 122 N. C. 862, 877.

And it will not detract from the value of such services that deceased had a wooden leg, if he did all of the usual work of a farm as well as ordinary people, and thereby supported a wife and eight children. *Hays v. Hogan*, 180 Mo. App. 237.

⁴⁴ *Railway Co. v. Howard*, 90 Tenn. 144, 150.

⁴⁵ *Missouri Pac. R. Co. v. Moffatt*, 60 Kan. 113, 72 Am. St. 343.

⁴⁶ *McHugh v. Schlosser*, 159 Pa. 480, 23 L.R.A. 574.

⁴⁷ *Louisville & N. R. Co. v. Berry*, 96 Ky. 604.

deceased would have earned during his expectancy of life and allow compensation measured by the loss of his earnings.⁴⁸ Proof of them, with the jurors' knowledge of his life expectancy, afford *data* for the computation of damages.⁴⁹ The cost of an annuity, free from all the contingencies of the loss of employment or earning power by sickness or other misfortune, has no relation to the benefit the survivor would have received if the decedent had continued to live.⁵⁰

The evidence of pecuniary injury need not be very strong in order that the case may go to the jury⁵¹ except as to damages made up of actual disbursements; these must be established.⁵² Where the action was brought by a father for the death of an adult, but unmarried, son the testimony was to the effect that the former was fifty-nine years of age, nearly blind and was otherwise injured; he worked when he could; that some five or six years before the son's death he had assisted him pecuniarily, but had not done so since. It was held that there was evidence of pecuniary injury.⁵³ A reasonable probability of pecuniary benefit is all that is required.⁵⁴ A less liberal construction has

⁴⁸ *Railroad v. Spence*, 93 Tenn. 173, 189, 42 Am. St. 907.

⁴⁹ *Louisville & N. R. Co. v. Morgan*, 114 Ala. 449, 458, 2 Am. Neg. Rep. 294; *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378; *Ohio & M. R. Co. v. Wangelin*, 152 Ill. 138; *Toledo St. R. Co. v. Mammet*, 13 Ohio C. O. 591.

Though proof of decedent's earnings is not made there may be a recovery by his minor children of the value of his support and maintenance. "The jury should be left free to exercise a considerable discretion in arriving at the amount of the verdict." *Gentry v. Wabash R. Co.*, 172 Mo. App. 638.

⁵⁰ *Hinsdale v. New York, etc. R. Co.*, 81 App. Div. (N. Y.) 617; *Mix v. Hamburg-A. S. Co.*, 85 App. Div. (N. Y.) 475; *Fajardo v. New York Cent., etc. R. Co.*, 84 App. Div. (N. Y.) 354.

⁵¹ *Lustig v. New York, etc. R. Co.*, 65 Hun 547, 5 Am. Neg. Cas. 536; *Omaha W. Co. v. Schamel*, 78 C. C. A. 68, 147 Fed. 502; *Ruppel v. United R.*, 1 Cal. App. 666, 19 Am. Neg. Rep. 303.

⁵² *Countryman v. Fonda, etc. R. Co.*, 166 N. Y. 201; *Leeds v. Metropolitan G. L. Co.*, 90 N. Y. 26.

⁵³ *Hetherington v. Northeastern R. Co.*, 9 Q. B. Div. 160; *Runciman v. Star Line S. S. Co.*, 35 New Bruns. 123.

Testimony showing the pecuniary circumstances of the next of kin, calling for help from those upon whom they are dependent, is relevant as to the issue as to whether or not, by reason of the death, they have suffered pecuniary loss. *St. Louis, etc. R. Co. v. Jacks*, 105 Ark. 347.

⁵⁴ *Harris v. McClintic-M. C. Co.*, 168 Mo. App. 724; *Pym v. Great*

been given the statute by the Irish court, which has held, in effect, that no injury is within its contemplation unless the deceased person has in fact rendered pecuniary assistance to the plaintiff.⁵⁵ And it has been ruled in some of the state courts

Northern R. Co., 4 B. & S. 406; Franklin v. Southeastern R. Co., 3 H. & N. 213; Dalton v. Same, 4 C. B. (N.S.) 296; McKay v. New England D. Co., 92 Me. 454.

Where the death in question was that of a woman 81 years of age, but healthy, active and very vigorous, a recovery of \$500 compensatory damages above the \$2,000 penalty provided by the statute was held not excessive, where it appeared that deceased aided her niece in caring for the children, washing dishes and sewing. Maier v. Metropolitan St. R. Co., 176 Mo. App. 29.

"It is unnecessary where recovery is sought of the amount which deceased would have expended on dependents, had his expectancy of life not been disappointed, to prove more than that he had persons who would have been distributees, had he left an estate, dependent on him for support, and the amount he contributed to their support; and there is no legitimate occasion to show the ages of his minor children." Alabama M. R. Co. v. Jones, 121 Ala. 113, 119.

But it has been held in that state that if the only evidence relied upon to furnish *data* for ascertaining the damages is the statement by the widow of the deceased that at the time of his death "we were saving \$35 a month," there is not a sufficient basis to support a verdict for damages. Louisville & N. R. Co. v. Pearson, 97 Ala. 211, 13 Am. Neg. Cas. 59.

⁵⁵ Bourke v. Cork & M. R. Co., 4

L. R. Ire. 682; Holleran v. Bagnell, 6 id. 333.

In Rowley v. London & N. R. Co., L. R. 8 Ex. 221, the mode of calculating damages under Lord Campbell's act was considered, the facts being that one of the persons who claimed compensation was the mother of the deceased, she being sixty-one at his death, and he forty. The mother held the son's personal covenant to allow her an annuity of 200*l.* a year during their joint lives. The jury were directed that they might allow her such a sum as would purchase such an annuity for a person of her age according to the average duration of human life. The elements for determining this sum were insurance tables showing such duration and a calculation of the value of such an annuity on government or other very good security. The majority of the court considered that the general rule of placing the injured party in the same pecuniary position as she would have occupied but for the casualty applied. An error was committed in calculating the annuity solely upon the probable duration of the mother's life, the contingency of the son dying before her being overlooked; and it was also error not to take into account the fact that the covenant was a personal one, and presumably of less value than a government obligation. The probable duration of the mother's life should have been calculated with reference to her health; but the facts concerning that ought to have been brought out by the party who would or might have been

that in the absence of a legal obligation resting upon the deceased to contribute to the support of his kinspeople they can maintain an action only upon making proof that he had contributed to them in some way, or recognized his family obligation to do so, and manifested a disposition to discharge it.⁵⁶ The age of the deceased, the probability of his being able, in view of advancing years, to continue to pursue his occupation, are matters concerning which the jury must be instructed.⁵⁷ In considering them the jury must take into account the constitution, habits, heredity and such experience of the effect of age on muscle and nerve and endurance as they may have had themselves,⁵⁸ and other contingencies affecting the gross earnings the decedent might have made.⁵⁹ It is not necessary to instruct the jury as to these matters unless request to so do is made; they may be considered in weighing the evidence, it being presumed the jurors are as cognizant of them as the judge.⁶⁰ The capacity of the deceased to earn money in his vocation may be proven, but the opinions of witnesses as to the amount he might earn in pursuits in which he had never engaged are not admissible.⁶¹ The existence of disease in the deceased which would probably

benefited by them. In the absence of anything showing the contrary, it was not error to direct the jury to consider the life as an average one, and to value it upon the basis of the tables.

The amount expended by the decedent for the support of those dependent upon him need not be shown if the amount of his earnings appears and it is shown that a large portion of them were used for their benefit. *Texas & P. R. Co. v. Johnson*, 48 Tex. Civ. App. 135.

⁵⁶ *McCoullough v. Chicago*, etc. R. Co., 160 Iowa 524, 47 L.R.A.(N.S.) 23; *Atchison*, etc. R. Co. v. *Ryan*, 62 Kan. 682; *Texas*, etc. R. Co. v. *Mills* (Tex. Civ. App.), 143 S. W. 690.

⁵⁷ *Meola v. Quincy M. Co.*, 174 Mich. 305; *Kroll v. Chicago*, etc. R.

Co., 150 Ill. App. 438; *Missouri*, etc. R. Co. v. *McLaughlin*, 73 Kan. 248, citing the text; *Little v. Bousfield & Co.* 165 Mich. 654; *Vowell v. Issaquah C. Co.*, 31 Wash. 103; *Central R. & B. Co. v. Roach*, 64 Ga. 635; *Georgia R. v. Pittman*, 73 Ga. 325, 14 Am. Neg. Cas. 188; *Railway Co. v. Sweet*, 60 Ark. 550; *Conley v. Maine Cent. R. Co.*, 95 Me. 149.

⁵⁸ *Central R. v. Thompson*, 76 Ga. 770; *Watson v. Seaboard A. L. R. Co.*, 133 N. C. 188.

⁵⁹ *Bussey v. Charleston & W. O. R. Co.*, 78 S. C. 352.

⁶⁰ *Central R. Co. v. Ray*, 129 Ga. 349.

⁶¹ *Atlantic*, etc. R. Co. v. *Newton*, 85 Ga. 517; *McLean v. Board*, 7 Vict. L. R. (law) 239; *Chicago*, etc. R. Co. v. *Sizer*, 1 Neb. (Unof.) 32. In Missouri it is not necessary

have shortened his life is a proper matter of proof.⁶² Where damages proportioned to the injury may be given, funeral expenses may be recovered.⁶³ In England such expenses are not recoverable;⁶⁴ but generally in this country they may be recovered if the law imposes upon the relatives for whose benefit the action is brought the obligation to bear them.⁶⁵ It is otherwise under an act which provides for the recovery of the reasonable expectation of pecuniary advantage which would have resulted from the continuation of the decedent's life if his estate is liable for such expenses,⁶⁶ and where the action is brought for the benefit of the estate of the decedent; the rule extends to the expenses of his sickness.⁶⁷ In Tennessee the contributory negligence of the deceased must be regarded by the jury in mitigation of the recovery.⁶⁸ The same rule obtains in Mississippi.⁶⁹

§ 1269. *Same subject.* Under the code of Georgia the plaintiff, whether widow or child, may recover the full value of the life of the deceased.⁷⁰ This excludes the wants and condition of the family before the husband's death as well as thereafter as an element of damages and leaves for the consideration of the jury the age, habits, health, occupation, expectation of life, ability to labor, probable increase or diminution of that ability with the lapse of time, rate of wages, etc., and the necessary personal

either to prove or allege the amount of wages earned by a minor child. The reason given for the decision is that in many cases such proof is impossible, as the child may be of such tender years that he would not be earning wages. *Dalton v. St. Louis Smelting & Refining Co.*, 188 Mo. App. 529.

⁶² *Duke v. St. Louis, etc. R. Co.*, 172 Fed. 684; *Columbus & W. R. Co. v. Bridges*, 86 Ala. 448, 13 Am. Neg. Cas. 94; *Schaidler v. Chicago & N. R. Co.*, 102 Wis. 564; *Chicago, etc. R. Co. v. Groner*, 51 Tex. Civ. App. 65.

⁶³ *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303, 324.

⁶⁴ *Dalton v. Southeastern R. Co.*,

4 C. B. (N.S.) 296; *Boulter v. Webster*, 13 Week. Rep. 289.

⁶⁵ *Murphy v. New York Cent., etc. R. Co.*, 88 N. Y. 445; *Pennsylvania R. Co. v. Banton*, 54 Pa. 495; *Owen v. Brockschmidt*, 54 Mo. 285; *The Mauch Chunk*, 139 Fed. 747.

⁶⁶ *Consolidated T. Co. v. Hone*, 60 N. J. L. 444.

⁶⁷ *Holland v. Brown*, 35 Fed. 43.

⁶⁸ *Western & A. R. Co. v. Roberson*, 9 O. C. A. 646, 61 Fed. 592, citing state cases.

⁶⁹ *Mississippi Cent. R. Co. v. Robinson*, 106 Miss. 896, 64 So. 838.

⁷⁰ *Atlantic C. L. R. Co. v. McDonald*, 135 Ga. 635; Act of 1878, p. 59; § 2971, Code of 1882.

expenses of the deceased as the elements entering into the damages.⁷¹ A subsequent statute, which is recognized as harsh, and is to be strictly construed,⁷² excludes a deduction from the value of the life on account of the necessary or personal expenses of the deceased had he lived.⁷³ The question was raised, but not decided, in an earlier case whether the damages recoverable by a child for the death of its parent might be reduced by the amount which the child could earn before becoming of age. Jackson, C. J., said: It is true that a parent may make the child, when able, work, but that is the privilege of the parent. It does not follow that the defendant may set off that ability against the duty to support the child and thus lessen her recovery. How much could she work? When would she be able to work? Is she now healthy? Will she be so a year or five years hence? The field of conjecture is too wide and too far off—too remote to be set off against that support which is the child's measure of damages.⁷⁴

In an action by a child to recover for the loss of a parent the measure of damages has been held to be its support during minority; the computation should begin from the parent's death, not from the date of the injury which caused it.⁷⁵

§ 1270. **Same subject.** The South Carolina statute provides that the "action shall be for the benefit of the wife, husband, parent and children of the person whose death shall have been caused, * * * and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom, and for whose benefit, such action shall be brought, and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled

⁷¹ *Central R. v. Rouse*, 77 Ga. 393; *Roswell v. Barnhart*, 96 Ga. 521.

⁷² *Smith v. Hatcher*, 102 Ga. 160; *Southern Bell Tel. & T. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694; *Atkinson v. Hardaway*, 10 Ga. App. 389; §§ 2782, 4425, Civil Code of

1910; *Southern R. Co. v. Decker*, 5 Ga. App. 21.

⁷³ *Clay v. Central R. & B. Co.*, 84 Ga. 345.

⁷⁴ *Atlanta, etc. R. v. Venable*, 67 Ga. 697.

⁷⁵ *Id.*; *St. Louis, etc. R. Co. v. Johnston*, 78 Tex. 536, 17 Am. Neg. Cas. 568.

to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate." Claims on behalf of adult children who were not living with their parents are not excluded though they are not legal; the "injury" referred to is not restricted to the deprivation of a legal right.⁷⁶ The measure of damages is not the pecuniary loss or injury alone of the beneficiaries; the jury may give such damages as they think proportionate to the injury,⁷⁷ though no proof of damage is made in case of the death of an infant.⁷⁸ Punitive damages are not recoverable.⁷⁹

§ 1271. **Same subject.** The Virginia statute authorizes the jury to award such damages as to it may seem fair and just. It is said to be remedial in its character and entitled to a liberal construction. Where nothing but compensation for pecuniary loss was claimed these rules were laid down: The damages were to be assessed with reference to the pecuniary loss sustained by the wife and children of the deceased. "First, by fixing them at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy and perseverance of the deceased during what would probably have been his life-time if he had not been killed. Second, by adding these to the value of his services in the superintendence, attention to and care of his family, of which they have been deprived by his death. As was very properly said in *Tilley v. Hudson River R. Co.*,⁸⁰ 'all these are elements of pecuniary success—component parts of that pecuniary capital of the continued exercise and employment of which the children were entitled to the benefits, and of which the wrongful act of the defendants deprived them.'"⁸¹ Under that statute the jury are not restricted to the consideration of pecuniary loss; they

⁷⁶ *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303.

⁷⁷ *Strother v. South Carolina & G. R.*, 47 S. C. 375, 12 Am. Neg. Cas. 582.

⁷⁸ *Mason v. Southern R.*, 58 S. C. 70.

⁷⁹ *Garrick v. Florida Cent. & P. R.*, 53 S. C. 448, 69 Am. St. 874.

⁸⁰ 29 N. Y. 252.

⁸¹ *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; *Same v. Noell*, 32 Gratt. 394

may award punitive damages;⁸² and, it seems, damages by way of solace and comfort to the family of the deceased.⁸³ Where punitive damages are not in issue the mitigating or aggravating circumstances connected with or leading up to the death are immaterial.⁸⁴ Evidence of the financial condition of deceased prior to his death is not competent.⁸⁵

§ 1272. **Recovery for death of child.** Under the Georgia statute a parent cannot recover for the death of a child unless he or she "contributes to his or her support."⁸⁶ Though dependence is essential,⁸⁷ it need not have been absolute;⁸⁸ nor is it necessary that the contributions made to the support of the parent have been made in pursuance of a legal obligation.⁸⁹ There cannot be a recovery under that statute when the child whose death is sued for was so young that it was incapable of rendering service. In the case of a child aged one year and eight months judicial notice will be taken that it cannot render valuable services.⁹⁰ In such a case the father may recover the expense reasonably and necessarily incurred in the burial of the child, including compensation for the loss of his own time for the purpose.⁹¹ A father who is self-sustaining is not a "dependent" because he has assumed the support of others and is legally chargeable therewith, though his earnings are inadequate to support them in the manner in which their circumstances made it proper for them to live, and the

⁸² *Matthews v. Warner*, 29 Gratt. 570, 26 Am. Rep. 396. See § 1263.

⁸³ *Baltimore & O. R. Co. v. Noell*, *supra*. But see *Norfolk & W. R. Co. v. Stevens*, 97 Va. 631, 46 L.R.A. 367.

⁸⁴ *Dunnagan v. Briggs*, 170 Mo. App. 691.

⁸⁵ *Chesapeake & O. R. Co. v. Ghee*, 110 Va. 527.

⁸⁶ *Smith v. Hatcher*, 102 Ga. 158; *Clay v. Central R. & B. Co.*, 84 Ga. 345. See *Western U. Tel. Co. v. Harris*, 6 Ga. App. 260.

⁸⁷ *Trammell v. Southern R. Co.*, 105 C. C. A. 221, 182 Fed. 789.

⁸⁸ *Daniels v. Savannah, etc. R.*

Co., 86 Ga. 236; *Savannah E. Co. v. Bell*, 124 Ga. 663; *Central R. Co. v. Henson*, 121 Ga. 462.

⁸⁹ *Savannah E. Co. v. Bell*, *supra*; *United States E. L. Co. v. Sullivan*, 22 App. Cas. (D. C.) 115.

⁹⁰ *Crenshaw v. Louisville & N. R. Co.*, 15 Ga. App. 182, holding that in Georgia it is conclusively presumed that a child less than two years of age is incapable of performing services of value.

⁹¹ *Southern R. Co. v. Covenia*, 100 Ga. 46, 62 Am. St. 312, 40 L.R.A. 253, 3 Am. Neg. Rep. 753; *Ferreira v. Honolulu R. T. & L. Co.*, 16 Hawaii 615.

deceased minor son contributed of his earnings to the support of his father and family.⁹² In an action by the mother evidence of the father's physical disability to labor is admissible to show her partial dependence upon the deceased minor son. Where the parents and minor children all live together and are mutually dependent upon the family labors, a child of fifteen years, the proceeds of whose labor comes into the common stock, is to be regarded as contributing substantially to the mother's support.⁹³ Partial or total dependence upon a deceased child is necessary under the Porto Rico act.⁹⁴ The dependence required by the Washington statute must be substantial and arise from necessitous want.⁹⁵ It was found to exist where a six-year old son was killed, on the theory that his blind father expected to use him when he became old enough to aid in his business.⁹⁶ A case is not within that act because the son gave his father the benefit of his earnings, no necessity for so doing existing. It is not required that the dependency be absolute.⁹⁷ The California statute has been construed to require proof of actual dependency in case of those who are not, from their relationship to the decedent, presumed to be dependent upon him.⁹⁸

Under statutes which proportion the damages to the injury resulting from the death it is not necessary that they be confined, in every case, to the time of the minority of the deceased child; they may or may not extend beyond that period.⁹⁹ In assessing damages more than ordinary discretion must be

⁹² *Georgia R. & B. Co. v. Spinks*, 111 Ga. 571.

⁹³ *Augusta R. Co. v. Glover*, 92 Ga. 132, 2 Am. Neg. Cas. 466; *Central R. Co. v. Henson*, *supra*.

As to what constitutes a "dependent" under the Florida statute, see *Louisville & N. R. Co. v. Jones*, 45 Fla. 407.

A court may not say that a child aged six is incapable of contributing to his mother's support though the contribution be made in labor. *Fulmer v. Inman*, 10 Ga. App. 680.

⁹⁴ *Vargas v. American R. Co.*, 1

Porto Rico Fed. 292; *Bosakowski v. Same*, *id.* 277.

⁹⁵ *Bortle v. Northern Pac. R. Co.*, 60 Wash. 552; *Penoza v. Northern Pac. Ry. Co.*, 215 Fed. 200.

⁹⁶ *Tecker v. Seattle, etc. R. Co.*, 60 Wash. 570.

⁹⁷ *Kanton v. Kelly*, 65 Wash. 614.

⁹⁸ *Balaklala Consol. Copper Co. v. Reardon*, 136 C. C. A. 186, 220 Fed. 584.

⁹⁹ *Houston, etc. R. Co. v. Cowser*, 57 Tex. 293; *Texas & P. R. Co. v. Lester*, 75 *id.* 56, 17 Am. Neg. Cas. 558; *McAdory v. Louisville & N. R.*

allowed the jury, yet, so far as possible, they should be aided by evidence. If in any case the damages may be estimated without evidence it can only be done where it is necessary, as where the child is of tender years. It is suggested that, in other cases, the nearest approximation to the necessary reasonable certainty for estimating damages is such sum as would purchase an annuity equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased, calculated upon the basis of all the facts and circumstances which can reasonably be adduced and including the probable duration of his life.¹ This measure is not, however, conclusive upon the jury if they find from the circumstances that an adult son might have increased his earnings or that his parents' needs might have become greater and that his disposition would have been to supply them.² But the contingency that he might not continue to furnish a sum which would buy an annuity equal to the sum he had furnished must be considered in the light of the probabilities affecting his own health, employment and life,³ as must the fact that his contributions to his parents were voluntary.⁴ In an action to recover for the death of a son aged twenty years it was ruled that whether or not a less sum than that to which his whole contributions would have amounted, would compensate the plaintiffs for the loss of such contribu-

Co., 94 Ala. 272, 13 Am. Neg. Cas. 114.

¹ *Houston, etc. R. Co. v. Cowser*, 57 Tex. 293; *St. Louis, etc. R. Co. v. Gordon*, 92 Ark. 617; *Texas, etc. R. Co. v. Kenny*, 46 Tex. Civ. App. 297. *Contra, Hirschkovitz v. Pennsylvania R. Co.*, 138 Fed. 438. See *Brown v. Erie R. Co.*, — N. J. L. —, 91 Atl. 1023, where a somewhat similar instruction was held not erroneous.

² *International, etc. R. Co. v. Kindred*, 57 Tex. 491, 17 Am. Neg. Cas. 583; *Texas & P. R. Co. v. Lester*, *supra*, 17 Am. Neg. Cas. 558, sustaining a verdict of \$4,200 in favor of a widow for the death of her only

child, a son of twenty-six, who contributed \$200 a year to her support, she being fifty-one years of age. In another case the mother was sixty; the deceased son twenty-two; his earnings were from \$60 to \$65 per month, about one-half of which was given her. A verdict for \$3,550 was proper. *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220, 17 Am. Neg. Cas. 596.

The suggested measure of damages controls. *Reiter-C. Mfg. Co. v. Hamlin*, 144 Ala. 192.

³ *McKay v. New England D. Co.*, 92 Me. 454; *Hackett v. Wisconsin Cent. R. Co.*, 141 Wis. 464.

⁴ *Hackett v. R. Co.*, *supra*.

tions as he would have made them, was for the jury, and it was error for the court to assume that the compensation must necessarily consist of a sum equal to such contributions.⁵ In an action to recover for the death of an adult son the former's pecuniary condition may be shown for the purpose of establishing a reasonable expectation of financial aid from the deceased, but not to increase the amount of damages.⁶ A more accurate statement of the rule is that any fact which tends to show the amount of the pecuniary loss to the beneficiary is competent, whether it tends to increase or diminish the damages.⁷ If an adult son voluntarily assumes the support of an aged parent who is unable to maintain himself the latter is as much entitled to the protection of a civil damage statute as if the son had been compelled to perform the statutory duty of

⁵ *Ft. Worth & D. City R. Co. v. Morrison*, 93 Tex. 527. See *Galveston, etc. R. Co. v. Pigott*, 54 Tex. Civ. App. 367.

⁶ *International, etc. R. Co. v. Kindred*, 57 Tex. 491; *Houston, etc. R. Co. v. White*, 23 Tex. Civ. App. 280; *Citizens' R. Co. v. Washington*, 24 Tex. Civ. App. 422.

⁷ *Bodin v. Duluth St. R. Co.*, 117 Minn. 513 (previous contributions by adult son to support of mother); *Murphy v. Gross*, 118 Minn. 311 (financial aid by minor son); *Reiter-C. Mfg. Co. v. Hamlin*, 144 Ala. 192; *Nordhaus v. Vandalia R. Co.*, 242 Ill. 166; *Huff v. Peoria & E. R. Co.*, 127 Ill. App. 242; *Storrs v. Northern Pac. R. Co.*, 148 App. Div. (N. Y.) 403; *Pressman v. Mooney*, 5 App. Div. (N. Y.) 121; *Thompson v. Johnston*, 86 Wis. 576, 586, 17 Am. Neg. Cas. 911; *Elwood v. Addison*, 26 Ind. App. 28, 35; *Cincinnati St. R. Co. v. Altemeier*, 60 Ohio St. 10, 18, 6 Am. Neg. Rep. 179, and cases cited.

Where it was shown that the father had received financial aid

from a minor son it was proper to show that the deceased was survived by his mother and brothers and sisters. *South Omaha W. W. Co. v. Vocasek*, 62 Neb. 710, 10 Am. Neg. Rep. 580. See *Terhune v. Cody C. Co.*, 72 App. Div. (N. Y.) 1.

The loss of prospective gifts by an adult son to his parents will ordinarily involve an inquiry into the means and earning capacity of the decedent on the one hand, and of the parents on the other. The extent of previous contributions for support is a proper matter for consideration, and the dependence of the parents upon the deceased, while not essential, is competent if it is shown to have been financially recognized by him. *McCoullough v. Chicago, etc. R. Co.*, 160 Iowa 524, 47 L.R.A.(N.S.) 23.

It may be shown how much an adult son contributed to the support of his parents. *Prendergast v. Chicago City R. Co.*, 114 Ill. App. 156.

The size of the plaintiff's family may be proved. *Ferreira v. Honolulu R. T. & L. Co.*, 16 Hawaii 615.

furnishing support.⁸ The loss of personal services rendered by a son to a parent who lives with him as a member of his family are to be compensated for.⁹ A statement made by the deceased to his mother that he would support and take care of her during life is competent evidence to show her reasonable expectation of pecuniary aid from him.¹⁰ A promise by an adult son

⁸ *Sneed v. Marysville G. & E. Co.*, 149 Cal. 704, citing the text; *De Puy v. Cook*, 90 Hun 43.

The mother of an adult son who does not live with her must show a pecuniary interest in the continuance of his life, in order to recover more than nominal damages for his death. *Halbert v. Louisville & N. R. Co.*, 183 Ill. App. 483.

It is immaterial to the right to recover under a death statute for the death of an adult unmarried child that the support furnished her parents was voluntary. *Richardson v. Detroit & M. R. Co.*, 176 Mich. 413.

⁹ *Valparaiso L. Co. v. Tyler*, 177 Ind. 278; *Smith v. Michigan Cent. R. Co.*, 35 Ind. App. 188.

It has been held that evidence was competent of the fact that after attaining majority the son contributed labor on the father's farm, although subsequently he became a railroad brakeman, which was his occupation at the time of death. It is said that this is something which can be measured in money, but the court does not intimate any reason for the decision, although there is an implication that the father had some expectation of further contributions of the same nature, of which he had been deprived. *Southern Kansas Ry. Co. of Texas v. Barnes*, — Tex. Civ. App. —, 173 S. W. 880.

A similar rule seems to have been applied where after leaving home a

son frequently returned and while at home rendered services to his father in caring for the farm, and when killed was contemplating a permanent return to the farm, to take charge of it. *Gulf, C. & S. F. Ry. Co. v. Hicks*, — Tex. Civ. App. —, 166 S. W. 1190.

¹⁰ *St. Louis, etc. R. Co. v. Jacks*, 105 Ark. 347; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496; *Memphis, etc. R. Co. v. Buckley*, 99 Ark. 422; *St. Louis S. R. Co. v. Huey* (Tex. Civ. App.), 130 S. W. 1017; *Leuque v. Madison G. & E. Co.*, 133 Wis. 547; *London & W. T. Co. v. Grand Trunk R. Co.*, 22 Ont. App. 262; *Stephens v. Toronto R. Co.*, 11 Ont. L. R. 19; *Houston, etc. R. Co. v. White*, 23 Tex. Civ. App. 280; *Bright v. Barnett*, 88 Wis. 299, 26 L.R.A. 524.

Statements of an adult son to third persons to the effect that he intended to send money to his mother are incompetent as hearsay, but the testimony of a witness that he gave decedent's mother money which decedent sent her is competent. *Halbert v. Louisville & N. R. Co.*, 183 Ill. App. 483.

In an action to recover for the death of a son where a mother is one of the plaintiffs it is competent to show that the son promised his mother that he would not marry during her lifetime so as to be able the more effectually to look after and care for her. *Gulf, C. & S. F. Ry. Co. v. Hicks*, — Tex. Civ. App. —, 166 S. W. 1190.

to reimburse his father for the expense of his education by assisting in the education of his sisters is relevant to show pecuniary loss by the father;¹¹ and so of the loss by the father of the prospect and expectation of the payment of a debt due him by the decedent.¹² The fact that a son who had left home and who had not aided his parents was capable of earning money and had shown a purpose to assist them is ground for a recovery.¹³ But in Ontario the financial ability to give the aid which the expressions of the decedent indicated it was his purpose to give must be shown as a basis for a reasonable expectation of pecuniary aid from him.¹⁴

In the case of the death of a minor child the pecuniary benefit its parents had a reasonable expectation of receiving from him, had he lived, is the measure of damages;¹⁵ and, in

Evidence that the deceased had purchased a home for his mother is competent on the issue of her reasonable expectancy of pecuniary benefits to be received from him had he lived. *Ft. Worth & R. G. Ry. Co. v. Keith*, — Tex. Civ. App. —, 163 S. W. 142.

Where the deceased has recognized his duty to his parents by giving them financial aid and it is reasonably probable he would have continued to do so had he lived, it is proper to consider that their need and his ability to assist them might increase. *McCoullough v. Chicago, etc. R. Co.*, 160 Iowa 524 (ruled under the Federal Employers' Liability Act).

¹¹ *Huff v. Peoria & E. R. Co.*, 127 Ill. App. 242.

The promise of an adult child to repay what had been expended for his education, some payments having been made, may be considered though the amount unpaid is not shown. *Palmer v. New York Cent., etc. R. Co.*, 153 App. Div. (N. Y.) 296.

¹² *Stangeland v. Minneapolis, etc.*

R. Co., 105 Minn. 224, ruled under the North Dakota statute.

¹³ *Dean v. Oregon R. & N. Co.*, 38 Wash. 565.

¹⁴ *Stephens v. Toronto R. Co.*, 11 Ont. L. R. 19.

¹⁵ *Trapp v. Rockford Elec. Co.*, 186 Ill. App. 379; *Swengel v. La Salle County Carbon Coal Co.*, 182 Ill. App. 623; *Vandalia Coal Co. v. Bland*, — Ind. App. —, 108 N. E. 176; *Standard Forgings Co. v. Holmstrom*, 58 Ind. App. 306; *American Motor Car Co. v. Robbins*, 181 Ind. 417; *Graffam v. Saco Grange, Patrons of Husbandry*, No. 53, 112 Me. 508, L.R.A. 1915C 632; *Curran v. Lewiston, A. & W. St. R. Co.*, 112 Me 96; *Toledo Rys. & Light Co. v. Wettstein*, 33 Ohio Cir. Ct. 15 [aff'd 79 Ohio St. 439]; *McFarland v. Oregon Elec. R. Co.*, 70 Ore. 27.

In Indiana the rule of damages in such a case is "the present worth of the amount which it is reasonably probable the deceased would have contributed to the support of the parent during the latter's expectancy of life in proportion to the

addition thereto, the cost of medical aid and other like expenses necessarily incurred¹⁶ were held recoverable, but those were not items of pecuniary injury resulting from the death.¹⁷ In Idaho, Missouri and Porto Rico, there may also be a recovery for the loss of the companionship and society of a child.¹⁸ The funeral expenses and the cost of transporting the corpse of a child to its home are recoverable.¹⁹ "The attentions and kind-

amount he was contributing at the time of his death, not exceeding his expectancy of life." *Standard Forgings Co. v. Holmstrom*, 58 Ind. App. 306.

¹⁶ *Fox v. Barekman*, 178 Ind. 572; *Johnson v. Industrial L. Co.*, 131 La. 897; *Deninger v. American Locomotive Co.*, 107 C. C. A. 126, 185 Fed. 22, applying Pennsylvania law; *Southern Indiana R. Co. v. Moore*, 34 Ind. App. 154; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *Brunswick v. White*, 70 Tex. 504. See § 1278.

In *McKeown v. Toronto R. Co.*, 19 Ont. L. R. 361, the Court of Appeal laid down the rule that the age of the child, the probability of its continued life to a period when it would become useful to a parent in the performance of services or in earning money which would benefit the parent are matters for the jury to consider, in connection with all the circumstances which may in any case terminate or shorten their performance. It need not be shown that any benefit has been derived from the child.

¹⁷ *Hutchinson v. West Jersey & S. R. Co. (N. J.)*, 170 Fed. 615. See *Murray v. Usher*, 117 N. Y. 542. *Contra*, *Leahy v. Davis*, 121 Mo. 227; § 1273.

"The age of the deceased, the probable value of his service, his habits, the probability that he would aid and assist are all to be taken into

consideration." *Knife & S. Co. v. Hathaway*, 27 Ohio C. C. 745, affirmed without opinion, 72 Ohio 623.

¹⁸ *Anderson v. Great Northern R. Co.*, 15 Idaho 513; *Sharp v. National B. Co.*, 179 Mo. 553 (the statutes of these states provide for the recovery of all the damages which under the circumstances may be just); *Morales v. San Juan L. & T. Co.*, 4 Porto Rico Fed. 361. *Contra*, *McFarland v. Oregon Elec. R. Co.*, 70 Ore. 27; *Standard Forgings Co. v. Holmstrom*, 58 Ind. App. 306; *Grafam v. Saco Grange, Patrons of Husbandry*, No. 53, 112 Me. 508, L.R.A.1915C 632.

¹⁹ *American Motor Car Co. v. Robbins*, 181 Ind. 417; *Carnego v. Crescent Coal Co.*, 164 Iowa 552; *Kelly v. City of Higginsville*, 185 Mo. App. 55; *Fox v. Barekman*, 178 Ind. 572; *Hedrick v. R. & N. Co.*, 4 Wash. 400; *Southern Indiana R. Co. v. Moore*, 34 Ind. App. 154; *Calcaterra v. Iovaldi*, 123 Mo. App. 347; *Coleman v. Himmelberger-H. L. & L. Co.*, 105 Mo. App. 254; *Leahy v. Davis*, 121 Mo. 227; *Esher v. Mineral R. & M. Co.*, 28 Pa. Super. Ct. 393; *Dean v. Oregon R. & N. Co.*, 44 Wash. 564; *Secard v. Rhinelander L. Co.*, 147 Wis. 614 (the act provides for the recovery of the "pecuniary loss"). But see *Pittsburgh, etc. R. Co. v. Brown*, 178 Ind. 11. See § 1265.

The funeral expenses of an adult child, a member of her father's household, and who had no estate,

ness of children to parents though adding nothing to their estate may add much to the physical comfort or ease of their life, independent of the affections or of the joy of companionship. The loss of these might under some circumstances be a pecuniary injury.”²⁰

Under the Texas statute “the jury may give such damages as they may think proportioned to the injury resulting from” the death. In an action to recover for the death of a child of six years the court say: “First, where the killing of the child was wrongful, etc., the parents are entitled to at least nominal damages. Second, where the testimony shows the bodily health and strength, the sprightliness, or want of it, of mind; the aptitude and willingness to be useful in performing services, the mode in which such faculties are exercised, as in useful labor or otherwise; and when, from the age and undeveloped state of the child, any estimate of the value of the services until majority would be matter of opinion in which no particular or especial knowledge in the way of expert testimony could be procured better than the judgment and common sense of the ordinary juror called to the duty of determining such value, then, upon such testimony, the sound discretion of the jury can be relied on to determine the value without any witness naming a sum.”²¹ Third, as the age of the child increases

may be recovered regardless of whether he could be compelled to meet them. “His relation to the child compelled it. His failure would have been abhorrent to his sense of duty, and to parental affection, and would have invited and received the contempt of all knowing of it.” *Palmer v. New York Cent., etc. R. Co.*, 153 App. Div. (N. Y.) 296.

Testimony as to the amount actually expended for funeral expenses is not in itself sufficient to show the reasonableness thereof. *Carnego v. Crescent Coal Co.*, 164 Iowa 552.

²⁰ *McKay v. New England D. Co.*, 92 Me. 454.

The services a child might have rendered are not limited to those having a money value, but include all he might have performed as shown by the evidence. *Southern Indiana R. Co. v. Moore*, 34 Ind. App. 154.

²¹ See *Golden v. Spokane, etc. R. Co.*, 20 Idaho 526.

The probable increase in the earnings of a minor may be regarded, and a verdict based thereon will not be set aside because it does not reduce the earnings he was making before death to their present value. *Kalis v. Detroit United R.*, 155 Mich. 485.

and his faculties develop, testimony to actual services can and should be produced, giving a wider basis of induction to the jury in calculating the damage from the loss.²² Fourth, the circumstances of the parents suing, as in this case, often become necessary as evidence; not as a basis for increasing or diminishing the amount, but to illustrate the acts of the child as useful or otherwise. In this case the parents kept a dairy; all the family worked. The child, by attending to some duties, relieved the mother so that she could engage in other necessary labor."²³ The character of a minor child for industry, economy and sobriety and his devotion to his parents may be considered in determining the pecuniary benefit they would have derived from him,²⁴ as may his aptitude for a special

²² It may be assumed that had the deceased lived and continued in his employment he would, as he progressed in skill, be entitled to an increase in salary from time to time until he would have received the highest rate paid for such services. *Clark v. Tulare Lake D. Co.*, 14 Cal. App. 414.

²³ *Brunswick v. White*, 70 Tex. 504, quoted from approvingly as to the discretion of the jury in *Waters-P. O. Co. v. Deselms*, 212 U. S. 159, 53 L. ed. 453; *St. Louis, etc. R. Co. v. Bolen* (Tex. Civ. App.), 129 S. W. 860; *San Antonio T. Co. v. Young* (Tex. Civ. App.), 141 S. W. 572.

Similarly it was held that where decedent, a boy 8 years old, was accustomed to "do chores" for his mother, who was somewhat of an invalid, and walked with difficulty, the services thus rendered by the child were an element of value to be taken into account in assessing damages for his death. The decision went in part at least on the ground that the services of the child obviated the necessity of hired help to perform the same services. *American Motor Car Co. v. Robbins*, 181 Ind. 417.

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²⁴ *Kelly v. City of Higginsville*, 185 Mo. App. 55; *St. Louis, etc. R. Co. v. Jacks*, 105 Ark. 347; *Ohio Valley T. Co. v. Wernke*, 179 Ind. 49; *Memphis, etc. R. Co. v. Buckley*, 99 Ark. 422; *Commerce C. O. Co. v. Camp* (Tex. Civ. App.), 129 S. W. 852; *St. Louis, etc. R. Co. v. Scott*, 102 Ark. 417; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 12 Am. Neg. Cas. 598; *Pierce v. Conners*, 20 Colo. 178, 37 Pac. 721.

The services which a strong, bright, well reared boy may render to his parents may have a value apart from the amount of wages he may earn from strangers and turn over to them, which is competent to be considered by the jury. *Kelly v. City of Higginsville*, *supra*.

It may be shown that a minor child had contracted for a home for his parent and was paying for it. *Southern Indiana R. Co. v. Moore*, *supra*.

The value of a son to his mother as an adviser and comforter may be considered. *Williams v. Bishop*, 12 Ohio N. P. (N.S.) 7.

"Where a child is killed all the proof that ordinarily can be offered is the age, sex, health, habits, dis-

calling;²⁵ the prospective increase in his earning capacity,²⁶ as well as any competent evidence tending to enhance or diminish the value of the child's services.²⁷ This may be predicated upon the possession of good qualities; but if the decedent "was wearing the swaddling clothes of apprenticeship" the earning capacity of a proficient man in the trade may not be shown.²⁸ In addition to the disposition manifested towards his parents, the state of the health and intelligence of a child may be gone into.²⁹ The amount contributed by a minor to his parents is a relevant fact, and a general description may be given of the family; but the wealth or poverty of the plaintiff may not be shown except as it may aid in determining the future conduct of the deceased had he continued in life.³⁰ But the age, health and poverty of the plaintiff may be shown to aid the jury in fixing the amount

position and temperament of the child, together with its mode of life, and the relatives who survived it, and, possibly," its service in some little employment. *Whitmer v. El Paso, etc. R. Co.*, 201 Fed. 193.

²⁵ *Snyder v. Lake Shore, etc. R. Co.*, 131 Mich. 418.

²⁶ *St. Louis, etc. R. Co. v. Scott, supra.*

²⁷ *Lake Erie & W. R. Co. v. Chriss*, 57 Ind. App. 145, citing this section; *Curran v. Lewiston, A. & W. St. R. Co.*, 112 Me. 96; *Graffam v. Saco Grange, Patrons of Husbandry*, No. 53, 112 Me. 508, L.R.A. 1915C 632.

Thus it was competent to show that the law required that deceased, a boy 11 years of age, be sent to school for nearly five years longer, as tending to show that during such time his services would have been worth little to his mother. *Graffam v. Saco Grange, supra.* To the same effect see *Curran v. Lewiston, A. & W. St. R. Co., supra.*

In an action for the death of an 8 year old boy, where the circumstances of his parents are shown, it is competent to show what oppor-

tunities are available for the employment of such a boy, and what wages he might have earned. *Firestine v. Philadelphia, etc. R. Co.*, 56 Pa. Super. Ct. 42.

²⁸ *Central F. Co. v. Bennett*, 144 Ala. 574; *Ohio Valley T. Co. v. Wernke*, 42 Ind. App. 326.

²⁹ *Black v. Michigan Cent. R. Co.*, 146 Mich. 568.

The fact that deceased, an adult, whose life insurance policy had been made payable to his mother as beneficiary, changed the beneficiary therein after her death and made his brother beneficiary is competent as tending to show his relations with his father, and as tending to show that he did not intend to contribute to the father's support, but hearsay evidence that such change to the brother instead of the father was at the request of the mother in order to provide for the education of the brother is incompetent, it not being part of the *res gestæ*. *St. Louis, B. & M. Ry. Co. v. Jenkins*, — Tex. Civ. App. —, 172 S. W. 984 [rev'g 163 S. W. 621].

³⁰ *Kerling v. Van Dusen*, 109

he would probably have received from the deceased.³¹ The fact that there are other children older than the deceased, their ages as compared with that of the parent and the probability that they would care for the parent are probably too remote to be weighed in assessing the compensation.³² The wages being earned when the injury causing death was sustained are persuasive as to the then earning capacity of the deceased.³³ The value of the services a child might have rendered to the family cannot be shown by opinion evidence.³⁴ In the absence of evidence as to services rendered or which might have been rendered, evidence of the age of a minor child, his intelligence, habits, disposition towards his parents and their situation are facts upon which a finding of a reasonable expectation of benefits may rest and support a verdict for substantial damages.³⁵

Minn. 481; *Love v. Detroit, etc. R. Co.*, 170 Mich. 1 (the present and prospective ability of the father to educate the deceased child may be shown in an action under the survival act).

The admissibility of evidence to show the financial circumstances of the family of a deceased child is argued in *Crabtree v. Missouri Pac. R. Co.*, 86 Neb. 33, 136 Am. St. 663, which distinguishes other local cases.

Although there is doubt whether the father will ever be situated so that he will require support or assistance from his son, the question whether he had a reasonable expectation of such assistance is for the jury. *Gulf, C. & S. F. Ry. Co. v. Hicks*, — Tex. Civ. App. —, 166 S. W. 1190.

³¹ *Birmingham R., L. & P. Co. v. Mosely*, 164 Ala. 111; *United States E. L. Co. v. Sullivan*, 22 App. Cas. (D. C.) 115.

The ages of the parents of the deceased, their state of health and financial condition and the number of children dependent upon them

have been referred to in connection with objections to the allowances made by juries. *Hayes v. Chicago, etc. R. Co.*, 131 Wis. 399; *Leque v. Madison G. & E. Co.*, 133 Wis. 547.

In a late New Jersey case, it is intimated that the amounts contributed to plaintiff's support by her second husband may be competent on the amount of her recovery for the death of a son by the former husband, which son also contributed thereto. *Brown v. Erie R. Co.*, — N. J. L. —, 91 Atl. 1023.

³² See *Golden v. Spokane, etc. R. Co.*, 20 Idaho 526.

³³ *Gulla v. Lehigh Valley C. Co.*, 28 Pa. Super. Ct. 11.

³⁴ *Cincinnati T. Co. v. Stephens*, 75 Ohio St. 171, reversing s. c., 7 Ohio C. C. (N. S.) 454.

³⁵ *Atchison, etc. R. Co. v. Fajardo*, 74 Kan. 314, 6 L.R.A. (N.S.) 681. To the same effect see *Lake Erie & W. R. Co. v. Chriss*, 57 Ind. App. 145 (where decedent was a 12-year-old school girl).

Where decedent was a 10-year-old boy, it appeared that he was bright, healthy, strong and energetic, at-

The Mississippi statute authorizes the recovery of such damages as the jury shall assess, taking into consideration all damages of every kind to any and all parties. It covers the value of the services of a child from death until majority; its physical and mental suffering intermediate the injury and death; such gratuities as there may be reasonable ground for expecting the parent would have received and such sum as the child could have recovered as the present value of its life expectancy. The recovery of gratuities must be based on their receipt by the parent before the death of the child.³⁶

In Colorado the father and mother of a deceased child may join in a suit to recover for its death. Their failure to do so does not prejudice the defendant, affect the elements of damage, the measure of recovery, nor justify a second suit.³⁷ The right of the father to recover burial expenses is not affected because his wife was improperly joined in the action.³⁸ Where burial expenses are a charge against the estate of the decedent they may be recovered only by such relatives as have the duty of interment cast upon them.³⁹ It has been held proper in an action to recover for the death of a girl aged eight years to show that her step-father was a school teacher and the compensation paid women teachers in the vicinity where deceased resided;

tending school, but working after school, going on errands and selling Sunday papers. He earned a small amount of money in this way and turned it over to his mother. A verdict of \$5,000 was held not excessive. *Meehan v. Adirondack Elec. Power Corp.*, 88 Misc. (N. Y.) 235.

³⁶ *Cumberland Tel. & T. Co. v. Anderson*, 89 Miss. 732.

Under this statute one suit may be brought by one of those interested in the name of all, and one suit shall determine the recovery of all if decided on its merits. A suit being instituted by a father, the damages recovered for the death of an 18-year-old son were \$200,

an amount, said the court, which was less than the market price of a good mule. The court inferred collusion between the father and an insurance company on the one hand, and defendant on the other, and allowed a recovery by the mother and sister separately, on the ground that the action had not been decided on its merits. *Sutberry v. Meridian Fertilizer Factory*, — Miss. —, 64 So. 723.

³⁷ *Pierce v. Connors*, 20 Colo. 178, 46 Am. St. 279.

³⁸ *Missouri, etc. R. Co. v. Evans*, 16 Tex. Civ. App. 68.

³⁹ *Herning v. Holt L. Co.*, 153 Wis. 101.

there was no presumption the child would follow the employment of her mother—that of housewife.⁴⁰ As tending to show what vocation a young son might have followed it may be shown in what occupations his father had engaged.⁴¹

§ 1273. **Same subject.** The principal element of damage to a parent as the result of the death of a child is the loss of its services during minority,⁴² considering the cost of support and maintenance during the helpless part of its life,⁴³ and education, taking into consideration the uncertainties of health and sickness and of life and death,⁴⁴ which is coincident with its minority when compensation for loss of services is demanded.⁴⁵ Sub-

⁴⁰ *Eginorie v. Union County*, 112 Iowa 558. See *Brown v. St. Louis & S. R. Co.*, 127 Mo. App. 499.

⁴¹ *Meggison v. Maine & Sons Co.*, 160 Iowa 541.

⁴² *Florida East Coast R. Co. v. Hayes*, 66 Fla. 589; *Toledo R. & L. Co. v. Wettstein*, 14 Ohio C. C. (N. S.) 441, affirmed without opinion, 79 Ohio St. 439.

⁴³ *Lake Erie & W. R. Co. v. Chriss*, 57 Ind. App. 145; *Graham v. Consolidated T. Co.*, 62 N. J. L. 90; *Terre Haute, etc. T. Co. v. Ma-berry*, 52 Ind. App. 114; *Hollen-back v. Stone & W. E. Co.*, 46 Mont. 559; *Chicago, R. I. & G. Ry. Co. v. Loftis*, — Tex. Civ. App. —, 168 S. W. 403; *Hedrick v. Ilwaco R. & N. Co.*, 4 Wash. 400; *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 20 Am. St. 143, 17 L.R.A. 71; *Southern R. Co. v. Covenia*, 100 Ga. 46, 3 Am. Neg. Rep. 753, 62 Am. St. 312, 40 L.R.A. 253; *Hopkinson v. Knapp*, 92 Iowa 328, 14 Am. Neg. Cas. 568; *Leahy v. Davis*, 121 Mo. 227, 233; *Schaffer v. Baker T. Co.*, 29 App. Div. (N. Y.) 459; *Ft. Worth & D. City R. Co. v. Hyatt*, 12 Tex. Civ. App. 435, 10 Am. Neg. Cas. 299; *Elwood v. Addison*, 26 Ind. App. 28, 35; *Murphy v. Willow Springs B. Co.*, 81 Neb. 219; *Smith v. Cissel*,

22 App. Cas. (D. C.) 318; *McDonald v. Champion I. & S. Co.*, 140 Mich. 401; *Calcaterra v. Iovaldi*, 123 Mo. App. 347; *Coleman v. Himmel-berger-H. L. & L. Co.*, 105 Mo. App. 254; *Barretto v. Moquin-O.-W. C. Co.*, 142 App. Div. (N. Y.) 504; *Scherer v. Schlager*, 18 N. D. 421, 24 L.R.A. (N.S.) 520, citing the text; *Tecker v. Seattle, etc. R. Co.*, 60 Wash. 570. See *Byrd v. South-ern Exp. Co.*, 139 N. C. 273.

Where there is no evidence of such expense, it is error to instruct the jury that they may take such fact into consideration in assessing damages for the death of a minor child. *Dalton v. St. Louis Smelting & Refining Co.*, 188 Mo. App. 529. But compare *Chicago, R. I. & G. Ry. Co. v. Loftis*, — Tex. Civ. App. —, 168 S. W. 403, holding that proof of the expense of maintenance must be made in order to maintain the action.

⁴⁴ *Kost v. Ashland*, 236 Pa. 164.

⁴⁵ *Cleveland, etc. R. Co. v. Miles*, 162 Ind. 646.

A late Missouri case states the rule of damages in such case to be the pecuniary value to the parent of the child's services during his minority, and the burial and other expenses incurred by his death, less

ject to exceptions, elsewhere noted, the recovery must be limited to the actual pecuniary injury sustained.⁴⁶ In Louisiana the expense of recovering the body of a child is an element of damage, as is the loss of services and filial offices; the amount the deceased might have recovered at the moment of death may also be recovered.⁴⁷ In that state the parents may recover as actual damages for their sorrow, for the present and future deprivation of the society of the deceased and the prospective aid and comfort which they might rightfully have expected from him had his life continued.⁴⁸ There may not be added to the recovery for mental suffering and for the loss of society and filial affection the *usufruct* to any estate which the child during minority might acquire by his own efforts in the absence of need by the parent.⁴⁹

The right to recover for the loss of a minor son's services is not affected by a probability that, had he lived, the parent might have given him his time or allowed him to spend it in idleness;⁵⁰ nor is the measure of recovery affected because the

the expense to his parents for his support and maintenance during minority. *Kelly v. City of Higginsville*, 185 Mo. App. 55.

⁴⁶ *Kost v. Ashland*, 236 Pa. 164; *Aaron v. Missouri & K. Tel. Co.*, 89 Kan. 186; *Speight v. Seaboard A. L. R.*, 161 N. C. 80; Cases cited in note 1 this section; *Esher v. Mineral R. & M. Co.*, 28 Pa. Super. Ct. 293; *Pepper v. Southern Pac. Co.*, 105 Cal. 389, 11 Am. Neg. Cas. 200; *Lange v. Schoettler*, 115 Cal. 388; *Wales v. Pacific Elec. M. Co.*, 130 Cal. 521; *Pierce v. Connors*, 20 Colo. 178, 46 Am. St. 279; *Diebold v. Sharp*, 19 Ind. App. 474; *Decker v. McSorley*, 111 Wis. 91, 13 Am. Neg. Rep. 631; *Fowler v. Chicago, etc. R. Co.*, 234 Ill. 619; *Illinois Cent. R. Co. v. Johnson*, 221 Ill. 42; *Grayhek v. Stern*, 154 Ill. App. 385; *Ohio Valley T. Co. v. Wernke*, 42 Ind. App. 326; *Cook v. American, etc. G. Co.*, 70 N. J. L. 65; *Renwick v. Galt, etc. St. R. Co.*,

12 Ont. L. R. 35. *Contra*, *Anderson v. Great Northern R. Co.*, 15 Idaho 513. See *Lomoe v. Superior W., L. & P. Co.*, 147 Wis. 5.

Anticipated pecuniary injury has been made a basis for a recovery under a statute providing for the recovery of such damages as the jury may deem just. It was said that the father was a workingman, and might come to great age and want, might be a paralytic. *Thomas v. Electrical Co.*, 54 W. Va. 395. See *O'Hara v. Laclede G. L. Co.*, 131 Mo. App. 428.

⁴⁷ *Le Blanc v. Sweet*, 107 La. 355.

⁴⁸ *Roby v. Kansas City S. R. Co.*, 130 La. 896; *Johnson v. Industrial L. Co.*, 131 La. 897.

⁴⁹ *Bourg v. Brownell-D. L. Co.*, 120 La. 1009, 124 Am. St. 456; *Cherry v. Louisiana & A. R. Co.*, 121 La. 471, 17 L.R.A. (N.S.) 505.

⁵⁰ *Luessen v. Oshkosh E. L. & P. Co.*, 109 Wis. 94.

parent had received a sum of money from an insurance company or the relief department of the employer of the deceased.⁵¹ A father who has deserted his family and has not communicated with them for years or furnished them support has no claim upon them for their earnings, and cannot recover for the death of one of them.⁵²

In several states the damages for the death of a child have been limited to the pecuniary benefits the parent had a legal right to claim from the child's services, and therefore the courts have confined the estimate to the period of minority.⁵³ An adult

⁵¹ *Boulden v. Pennsylvania R. Co.*, 11 Pa. 264; *North Pennsylvania R. Co. v. Kirk*, 90 Pa. 15.

⁵² *Thompson v. Chicago, etc. R. Co.*, 104 Fed. 845; *Swift v. Johnson*, 1 L.R.A.(N.S.) 1161, 71 C. C. A. 619, 138 Fed. 867; *Chaloux v. International P. Co.*, 75 N. H. 281, 139 Am. St. 690.

⁵³ *Wallace v. Grand Trunk W. R. Co.*, 179 Mich. 277; *Lincoln v. Detroit & M. R. Co.*, 179 Mich. 189, 51 L.R.A.(N.S.) 710; *Chicago, R. I. & G. Ry. Co. v. Loftis*, — Tex. Civ. App. —, 168 S. W. 403; *Deninger v. American Locomotive Co.*, 107 C. C. A. 126, 185 Fed. 22 (Pa.); *State v. Miller*, 180 Fed. 796 (Md.); *Golden v. Spokane & I. E. R. Co.*, 20 Idaho 526; *Barnes v. Columbia L. Co.*, 107 Mo. App. 608; *Esher v. Mineral R. & M. Co.*, 28 Pa. Super. Ct. 393; *State v. Baltimore, etc. R. Co.*, 24 Md. 84, 107, 87 Am. Dec. 600; *Agricultural, etc. Ass'n v. State*, 71 Md. 86, 17 Am. St. 507; *Hurst v. Detroit City R. Co.*, 84 Mich. 539; *Cooper v. Lake Shore, etc. R. Co.*, 66 Mich. 261, 12 Am. Neg. Cas. 130, 11 Am. St. 482; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Chicago v. Scholten*, 75 Ill. 468; *Rockford, etc. R. Co. v. Delaney*, 82 id. 198, 25 Am. Rep. 308; *Caldwell v. Brown*, 53 Pa. 453, 12

Am. Neg. Cas. 533, 17 Am. Neg. Cas. 236; *Mobile & O. R. Co. v. Watty*, 69 Miss. 145, 12 Am. Neg. Cas. 186; *Leahy v. Davis*, 121 Mo. 227; *Schnable v. Providence Public Market*, 24 R. I. 477.

The ground upon which the recovery is so limited is indicated by the opinion in *Cooper v. R. Co.*, *supra*: Here was a broad field of chance and probabilities laid open before the jury through which they could roam without limit. They were permitted to speculate upon the future, and consider the probabilities or the possibilities of its unknown and unknowable contingencies; to consider and guess at what might occur had the daughter not been killed, and had lived to an age measured by the probable duration of the life of a person 11 years of age. They were given the *data* of a healthy girl of 11 years of age, born of poor parents, living with and being cared for by her grandmother; and from this they were required to solve the mighty problem of a life whose future was unknown, and from its unfathomable depths to figure out the chances of pecuniary benefits the parents of that child would have received had she lived past the age of majority.

On the other hand, in *Birkett v.*

child is under no legal obligation to support his parents, and it is not to be presumed they would have survived him, and he would have remained unmarried. Hence, they are not entitled to recover a sum equal to that he might have earned had his life not been cut short.⁵⁴ A distinction has been made between the probability that a minor might become of pecuniary benefit to his parents after attaining his majority and the case of an adult where the family relation continued to exist between the latter and his parents and they had a reasonable expectation of pecuniary advantage from him or were being benefited by him; in such cases there is a lessening of the elements of uncertainty.⁵⁵ On the other hand, if the adult does not sustain the relation of a member of the family to his parents, but has a home of his own, the uncertainties as to the probability of financial aid to them is broadened.⁵⁶ Where the deceased was married and contributed her personal earnings to the support of her mother and the latter's young children these considerations were material

Knickerbocker Ice. Co., 110 N. Y. 504, 12 Am. Neg. Cas. 306, it was said: The jury were not bound, in estimating the compensation to be made for the death of the child, to confine their considerations to her minority. It is true that the plaintiff, as father, could command her services only during minority. But in certain circumstances she might after her majority owe him the duty of support, which could, by legal proceedings, be enforced; and after that event she might, in many ways, be of great pecuniary benefit to him. In estimating the pecuniary value of this child to her next of kin the jury could take into consideration all the probable, or even possible, benefits which might result to them from her life, modified, as in their estimation they should be, by all the chances of failure and misfortune. There is no rule but their own good sense for their guidance,

and they were not in this case bound to assume that no pecuniary benefits would come to the next of kin from this child after her majority. See § 1275.

There is no presumption, from the mere relation of the parties that a parent is a pecuniary loser by the death of a child, except as to the period of minority. *Andrzejewski v. Northwestern Fuel Co.*, 158 Wis. 170.

⁵⁴ *Louisville, etc. R. Co. v. Wright*, 134 Ind. 509.

⁵⁵ *Deninger v. American L. Co.*, *supra*; *Hillebrand v. Standard B. Co.*, 139 Cal. 233; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496.

⁵⁶ Evidence that an adult son may have personal family needs in the future is competent on the question of the probable financial assistance he would have rendered his parents had he lived. *Andrzejewski v. Northwestern Fuel Co.*, 158 Wis. 170.

in ascertaining the recovery: that she might bear children; was under no legal obligation to support her next of kin; that her husband might require her services; that her infant brother and sister would, in a few years, be able to support their mother.⁵⁷ It has been observed in a California case, the deceased having attained his majority, that it is doubtful whether the jury should consider at all as an element of damage the parent's loss of his comfort, society and protection. The right to change his residence rendered the consideration of that consequence too remote.⁵⁸ The counsel and advice of an adult child to his parent may be regarded,⁵⁹ and, in addition, that such a son who had been absent from his father's house had returned thereto and had rendered services in the father's business without being compensated therefor.⁶⁰ If the damages recovered are required to be distributed as if the deceased had died intestate, leaving personalty, the fact that some of the plaintiffs can recover only nominal damages, because of their lack of pecuniary interest in the life of the deceased, does not justify an increase of the award above the actual loss in order that the parent may receive such sum as the jury think proper,⁶¹ nor does the fact that the suit is brought on behalf of collateral kindred who have not received pecuniary aid and from the deceased affect the recovery by lineal kindred who have been so aided; in other words, the apportionment of the damages is not a matter of concern to the defendant.⁶² The restriction of the recovery to the pecuniary benefit

⁵⁷ *Commercial Club v. Hilliker*, 20 Ind. App. 239.

⁵⁸ *Pepper v. Southern Pac. Co.*, 105 Cal. 389, 11 Am. Neg. Cas. 200.

But it is said in a later case that the pecuniary loss suffered by the parents' deprivation of the comfort and society of the child is not limited to the minority of the child or until such time as he might become married. *Quill v. Southern Pac. Co.*, 140 Cal. 268, 15 Am. Neg. Rep. 692.

It is settled law in California that a parent is entitled to recover,

under a general allegation of damages, for not only the loss of service, but also for the loss of the comfort, society and protection of the child. *Young v. Fresno Flume & Irrigation Co.*, 24 Cal. App. 286 (son 18 years old).

⁵⁹ *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496.

⁶⁰ *North Pennsylvania R. Co. v. Kirk*, 90 Pa. 15.

⁶¹ *Faulkenau v. Dowland*, 70 Ill. App. 20.

⁶² *Smiley v. East St. Louis & S. R. Co.*, 169 Ill. App. 29.

the parent had a legal right to demand from the deceased, though strictly accurate so far as legal right is concerned,⁶³ has not generally been given controlling force in actions for the recovery of pecuniary damages sustained by the next of kin to the deceased. The principle which usually governs is that the jury should calculate the damages in reference to a reasonable expectation of benefits as of right or otherwise from the continuance of the life.⁶⁴ Legal liability alone is not the test of the injury in respect of which damages may be recovered; but the reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into account.⁶⁵ It is not

⁶³ *Keenan v. Brooklyn City R. Co.*, 145 N. Y. 348, 12 Am. Neg. Cas. 328; *Southern Kansas Ry. Co. of Texas v. Barnes*, — Tex. Civ. App. —, 173 S. W. 880.

⁶⁴ *Southern Kansas Ry. Co. of Texas v. Barnes*, — Tex. Civ. App. —, 173 S. W. 880; *Andrzejewski v. Northwestern Fuel Co.*, 158 Wis. 170; *Carlin v. Deahl*, 172 Ill. App. 197; *Krueger v. Union G. & E. Co.*, 163 Ill. App. 486; *Hegberg v. St. Louis, etc. R. Co.*, 164 Mo. App. 514; *Freeman v. Morales* (Tex. Civ. App.), 151 S. W. 644; *Missouri, etc. R. Co. v. Henderson* (Tex. Civ. App.), 148 S. W. 822; *Hirschkovitz v. Pennsylvania R. Co.*, 138 Fed. 438; *Hillebrand v. Standard B. Co.*, 139 Cal. 233; *Chicago & A. R. Co. v. Louderback*, 125 Ill. App. 323; *Consolidated C. Co. v. Stein*, 122 id. 310; *Gilman v. Dart H. Co.*, 42 Mont. 96; *Polo v. Palisade C. Co.*, 75 N. J. L. 873; *Predmore v. Consumers' L. & P. Co.*, 99 App. Div. (N. Y.) 551; *Missouri, etc. R. Co. v. Snowden*, 44 Tex. Civ. App. 509; *Chicago v. Keefe*, 114 Ill. 222; *Sieber v. Great Northern R. Co.*, 76 Minn. 269, 7 Am. Neg. Rep. 107.

While there is a difference between a gift and a contribution for support, yet where the child is un-

der no legal obligation to support the parent both are gratuities, and evidence of either is competent, if accompanied with evidence of reasonable expectation of further gratuities, as tending to show something of which the parent is deprived by the death. *Southern Kansas Ry. Co. of Texas v. Barnes*, — Tex. Civ. App. —, 173 S. W. 880.

⁶⁵ *St. Louis, B. & M. Ry. Co. v. Jenkins*, — Tex. Civ. App. —, 172 S. W. 984; *Whitmer v. El Paso & S. W. Co.*, (New Mexico), 119 C. C. A. 637, 201 Fed. 193; *Aaron v. Missouri & K. Tel. Co.*, 89 Kan. 186; *Hollenback v. Stone & W. E. Co.*, 46 Mont. 559; *Rober v. Northern Pac. R. Co.*, 25 N. D. 394; *McKay v. New England D. Co.*, 92 Me. 454; *North Pennsylvania R. Co. v. Kirk*, 90 Pa. 15; *Pennsylvania Co. v. Scofield* (Pa.), 88 C. C. A. 602, 161 Fed. 911; *Hopper v. Denver, etc. R. Co.*, 84 C. C. A. 21, 155 Fed. 273; *Baker v. Philadelphia & R. R. Co.*, 149 Fed. 882; *Egan v. Southern T. Co.*, 189 Fed. 543; *United States E. L. Co. v. Sullivan*, 22 App. Cas. (D. C.) 115; *Peters v. Southern Pac. Co.*, 160 Cal. 48; *Bond v. United R.*, 159 Cal. 270; *Sneed v. Marysville G. & E. Co.*, 149 Cal. 704, citing the text; *Grayhek v. Stein*, 154 Ill. App. 385;

essential to the recovery of substantial damages by the father of an adult son that the latter had accumulated property or given

Chicago, etc. R. Co. v. Fowler, 138 id. 352; Chicago City R. Co. v. Reddick, 139 id. 160 (the damages must be left largely to the discretion of the jury); United States B. Co. v. Stoltenberg, 113 id. 435; Prendergast v. Chicago City R. Co., 114 id. 156; Ferreira v. Honolulu R., T. & L. Co., 16 Hawaii 615; Louisville & N. R. Co. v. Gollihur, 40 Ind. App. 480; Fidelity L. & I. Co. v. Buzard, 69 Kan. 330; Youngquist v. Minneapolis St. R. Co., 102 Minn. 501; McVeigh v. Minneapolis, etc. R. Co., 113 Minn. 450; Smith v. Coon, 89 Neb. 776; Crabtree v. Missouri Pac. R. Co., 86 Neb. 33, 136 Am. St. 663; Greenwood v. King, 82 Neb. 17; Draper v. Tucker, 69 Neb. 434; Leque v. Madison G. & E. Co., 133 Wis. 547; Hayes v. Chicago, etc. R. Co., 131 Wis. 399; Cox v. Kansas City, 86 Kan. 298; Dalton v. Southeastern R. Co., 4 C. B. (N. S.) 296; Franklin v. Same, 3 H. & N. 211; Pym v. Great Northern R. Co., 2 B. & S. 759; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291, 9 Am. Neg. Cas. 491; Hutchins v. St. Paul, etc. R. Co., 44 Minn. 5; Shaber v. Same, 28 Minn. 103; Robel v. Chicago, etc. R. Co., 35 Minn., 84, 16 Am. Neg. Cas. 280; Scheffler v. Minneapolis, etc. R. Co., 32 Minn. 518; Hall v. Galveston, etc. R. Co., 39 Fed. 18; Gunderson v. Northwestern E. Co., 47 Minn. 161; Paulmier v. Erie R. Co., 34 N. J. L. 151; 16 Am. Neg. Cas. 643; Johnson v. Chicago, etc. R. Co., 64 Wis. 425; Tuteur v. Chicago, etc. R. Co., 77 Wis. 505; Schadewald v. Milwaukee, etc. R. Co., 55 Wis. 569; Lehigh I. Co. v. Rupp, 100 Pa. 95; North Pennsylvania R. Co. v. Kirk, 90 id. 15; Pennsylvania R. Co. v. Adams, 55

id. 499; Birkett v. Knickerbocker I. Co., 110 N. Y. 504, 12 Am. Neg. Cas. 306; Fordyce v. McCants, 51 Ark. 509, 14 Am. St. 69, 4 L.R.A. 296; St. Joseph, etc. R. Co. v. Wheeler, 35 Kan. 185; Walters v. Chicago, etc. R. Co., 36 Iowa 458; Munro v. Pacific Coast D. & R. Co., 84 Cal. 515, 18 Am. St. 248; Pennsylvania Co. v. Lilly, 73 Ind. 252; Lockwood v. New York, etc. R. Co., 98 N. Y. 523; Illinois Cent. R. Co. v. Reardon, 157 Ill. 372, 14 Am. Neg. Cas. 349; Baltimore & O. S. R. Co. v. Then, 159 Ill. 535; Chicago, etc. R. Co. v. Branyan, 10 Ind. App. 570, 14 Am. Neg. Cas. 542; Atchison, etc. R. Co. v. Cross, 58 Kan. 424, 3 Am. Neg. Rep. 26; Graham v. Consolidated T. Co., 64 N. J. L. 10; Armour v. Czischki, 59 Ill. App. 17, 14 Am. Neg. Cas. 332; Boyden v. Fitchburg R. Co., 70 Vt. 125, 5 Am. Neg. Rep. 1; Thompson v. Johnston, 76 Wis. 576, 17 Am. Neg. Cas. 911, 23 L.R.A. 524; Bright v. Barnett & R. Co., 88 Wis. 299, 26 L.R.A. 524; Texas & P. R. Co. v. Wilder, 35 C. C. A. 105, 92 Fed. 953, quoting the text; Houston City St. R. Co. v. Sciacca, 80 Tex. 350; Rombough v. Balch, 27 Ont. App. 32, 44; West Chicago St. R. Co. v. Dooley, 76 Ill. App. 424; Decker v. McSorley, 111 Wis. 91, 13 Am. Neg. Rep. 631; Chicago, etc. R. Co. v. Beaver, 199 Ill. 34; Draper v. Tucker, 69 Neb. 434.

The scope of a promise made by the decedent to his father must be given effect. Scofield v. Pennsylvania Co., 149 Fed. 601.

There must be substantial evidence of a reasonable expectation of pecuniary benefit to the parent. The conditions surrounding the bene-

pecuniary aid to the former after attaining his majority, other facts being proved which justify the conclusion of substantial loss.⁶⁶ There is not, however, entire agreement on this question. In some courts the award must be predicated upon conditions existing and the contributions being made by an adult son at the time of and prior to his death.⁶⁷ This element of damage must be limited to such pecuniary benefits as might be reasonably expected to have been received after the child attained his majority;⁶⁸ it is error to extend it to such benefits as might be conferred.⁶⁹ The restrictive view has been sanctioned in the case of a child of such tender years as to be unable to render service or afford any evidence of an intention to render pecun-

ficiary and the deceased at the time of the death, their past relations and the law of human experience are the sole *criteria* of the expectation and of its reasonableness. *Swift v. Johnson*, 71 C. C. A. 619, 138 Fed. 867, 1 L.R.A.(N.S.) 1161.

Sufficient *data* for the assessment of damages in favor of the nondependent parents of an adult son is furnished by proof of the relationship, a willing disposition to contribute, a capability to do so, which was likely to increase, actual contributions and a definite plan from which further contributions were likely to result. *Pittsburg Vitrified P. & B. Co. v. Fisher*, 79 Kan. 576.

In a late Texas case the appellate court approved an issue submitted by the trial court to the jury as follows: "Say what sum of money, if paid now, would be equal to the pecuniary benefit, if any, that plaintiff had a reasonable expectation of receiving from his deceased son, had he lived." It was further held that this involved the ascertainment of the total sum to be paid by the son, which when discounted at the legal rate of interest, would show the present worth of the sum found. *St. Louis, B. & M. Ry. Co. v. Jen-*

kins, — Tex. Civ. App. —, 172 S. W. 984.

⁶⁶ *Sieber v. Great Northern R. Co.*, 76 Minn. 269, 7 Am. Neg. Rep. 107; *Huff v. Peoria & E. R. Co.*, 127 Ill. App. 242. Compare *Standard L. & P. Co. v. Muncey*, 33 Tex. Civ. App. 416.

In Illinois it is not material to the right of a parent whether or not the deceased had contributed to his support; that is material only when the recovery is sought by collateral kindred. The rule that actual damages are presumed in favor of lineal kindred extends to the death of an adult child. *Huff v. Peoria & E. R. Co.*, 127 Ill. App. 242; *Smiley v. East St. Louis & S. R. Co.*, 169 id. 29.

⁶⁷ *Chicago, etc. R. Co. v. Vester*, 47 Ind. App. 141; *Standard L. & P. Co. v. Muncey*, 33 Tex. Civ. App. 416; *Swanson v. Oakes*, 93 Minn. 404.

⁶⁸ *Stockton v. Pennsylvania R. Co.*, 182 Fed. 282 (New Jersey); *Griffin v. Fredonia B. Co.*, 90 Kan. 375.

⁶⁹ *Ft. Worth & D. City R. Co. v. Hyatt*, 12 Tex. Civ. App. 435; *London & W. T. Co. v. Grand Trunk R. Co.*, 22 Ont. App. 262.

iary aid after its majority to its parents,⁷⁰ though it has been disapproved where the minor is of such age as to be capable of indicating an intention to aid his parents after his majority.⁷¹ In most of the cases dealing with this question no distinction is made on account of the age of the minors, the courts proceeding on the theory that the laws of nature will secure to parents assistance from their adult children in case the need therefor and the ability to meet the need exist.⁷² Unless the financial condition of the parents is proven there should be no allowance for services after the majority of the infant.⁷³ The damage resulting to parents from the death of a son in consequence of the nonfulfilment of a contract on his part to support them is too remote to be an element of loss.⁷⁴ Where the only evidence of damage to the father consisted of the loss of the son's aid in carrying out a contract a recovery was denied.⁷⁵

The probable life of the beneficiary is to be regarded in awarding damages as well as that of the deceased but for his untimely death.⁷⁶ But the absence of direct testimony on this point may be supplied by other evidence, as where the parent

⁷⁰ *Little Rock, etc. R. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44, 11 Am. Neg. Cas. 147; *St. Louis, etc. R. Co. v. Freeman*, 36 Ark. 41, 11 Am. Neg. Cas. 147.

⁷¹ *Railway Co. v. Davis*, 55 Ark. 462, 13 Am. Neg. Cas. 229, 230.

⁷² *Birkett v. Knickerbocker I. Co.*, 110 N. Y. 504, 12 Am. Neg. Cas. 306; *Illinois Cent. R. Co. v. Warriner*, 229 Ill. 91; *United B. Co. v. Stoltenberg*, 211 Ill. 531, 17 Am. Neg. Rep. 193.

⁷³ *Potter v. Chicago & N. R. Co.*, 21 Wis. 372, 376, 94 Am. Dec. 548, 7 Am. Neg. Cas. 157; *Fidelity L. & I. Co. v. Buzzard*, 69 Kan. 330; *Gilman v. Dart H. Co.*, 42 Mont. 96.

⁷⁴ *Brink v. Wabash R. Co.*, 160 Mo. 87, 53 L.R.A. 811; *Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co.*, 25 Conn. 262, 65 Am. Dec. 571.

⁷⁵ *Sykes v. Northeastern R. Co.*, 44 L. J. (C. P.) 191, 32 L. T. 199, 23 Week. Rep. 483.

⁷⁶ *Andrzejewski v. Northwestern Fuel Co.*, 158 Wis. 170; *Swift v. Gaylord*, 229 Ill. 330; *Fidelity L. & I. Co. v. Buzzard*, *supra*; *Vargas v. American R. Co.*, 1 Porto Rico Fed. 292; *Duval v. Hunt*, 24 Fla. 85, 13 Am. Neg. Cas. 848; *Fordyce v. McCants*, 51 Ark. 509, 14 Am. St. 69, 4 L.R.A. 296; *Jackson v. Consolidated T. Co.*, 59 N. J. L. 25; *Carpenter v. Buffalo, etc. R. Co.*, 38 Hun 120. See § 1268.

Under a statute making the amount recovered the absolute property of the beneficiary his age is not material. *Trimmier v. Atlanta & C. R. Co.*, 81 S. C. 203; *Turbyfill v. Same*, 86 S. C. 279; *Alabama S. & W. Co. v. Griffin*, 149 Ala. 423.

is a witness and fully examined as to her circumstances in life, including the fact that she was the mother of four children.⁷⁷ Where there are several plaintiffs the expectancy of life of the older of them controls, and if proof thereof is not made the probable earnings of the decedent cannot be recovered.⁷⁸ The death of the plaintiff intermediate the death of the decedent and the trial limits the damages to such as were sustained during the *interim* between their respective deaths.⁷⁹

§ 1274. **Same subject.** Statutes which give the right to recover for the benefit of the next of kin permit parents to recover for the death of adult children on the principle just stated. Why, therefore, when a minor is killed should the estimate of damages stop arbitrarily at majority? It is true that in the former case there may be evidence to support the expectation of benefit, and none in the latter except such as is afforded by the fact of relationship and the general experience. Where the deceased is a minor and leaves a parent entitled to his services the law presumes there has been a pecuniary loss for which compensation under the statute may be given.⁸⁰ In such cases the loss may be estimated from the facts proven, in connection with the knowledge and experience possessed by

⁷⁷ Florida E. C. R. Co. v. Jackson, 65 Fla. 393; Hegberg v. St. Louis, etc. R. Co., 164 Mo. App. 514; Moskovitz v. Lighte, 68 Hun 102; Groves v. McNeil, 226 Pa. 345.

⁷⁸ Mississippi O. Co. v. Smith, 95 Miss. 528.

⁷⁹ Pitkin v. New York Cent., etc. R. Co., 94 App. Div. (N. Y.) 31, 16 Am. Neg. Rep. 321.

⁸⁰ Savage v. Hayes, 142 Ill. App. 316; Adams Exp. Co. v. Byers, 177 Ind. 33. See Graham v. Consolidated T. Co., 62 N. J. L. 90.

Where the child was less than three years old the court refused to set aside a verdict for six cents. Silberstein v. Wicke Co., 29 Abb. N. C. 291.

In Southern R. Co. v. Covenia, 100 Ga. 46, 3 Am. Neg. Rep. 753, 62 Am.

St. 312, 40 L.R.A. 253, judicial notice was taken of the fact that a child less than two years of age could not render service which could be valued in money.

In Atlanta Con. St. R. Co. v. Arnold, 100 Ga. 566, 3 Am. Neg. Rep. 753, the same conclusion was arrived at as to a child less than three years old.

In Crawford v. Southern R. Co., 106 Ga. 870, 6 Am. Neg. Rep. 459, it was ruled that it was for the jury to find whether a child of four and a half years could render valuable service.

In The Oceanic, 61 Fed. 338, 364, the court allowed \$1,000 to a mother for the death of a daughter four and one-half years old.

all persons in relation to matters of common observation.⁸¹ No doubt the estimate of damages may be aided by proof of the personal characteristics of the deceased. Evidence of his mental and physical capacity to be of service to his parent, his past earnings, habits of industry and sobriety, where the deceased is old enough to have established a character, are all facts to be considered in calculating the pecuniary loss sustained;⁸²

⁸¹ *Trapp v. Rockford Elec. Co.*, 186 Ill. App. 379; *Lake Erie & W. R. Co. v. Chriss*, 57 Ind. App. 145; *Dalton v. St. Louis Smelting & Refining Co.*, 188 Mo. App. 529; *Arnold v. State*, 163 App. Div. (N. Y.) 253; *Cosgrove v. Hay*, 54 Pa. Super. Ct. 175; *Illinois Cent. R. Co. v. Wariner*, 229 Ill. 91.

⁸² *Roberts v. Louisiana R. & N. Co.*, 132 La. 446; *Woodstock I. Works v. Kline*, 149 Ala. 391; *Alabama S. & W. Co. v. Griffin*, 149 Ala. 423; *Central F. Co. v. Bennett*, 144 Ala. 184, 1 L.R.A.(N.S.) 1150, 113 Am. St. 32; *Fowler v. Chicago*, etc. R. Co., 234 Ill. 619; *Ross v. Same*, 149 Ill. App. 286; *Ferreira v. Honolulu R. T. & L. Co.*, 16 Hawaii 615; *Jackson K. & S. Co. v. Hathaway*, 7 Ohio C. C. (N.S.) 242; *Rockford, etc. R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 308; *Stafford v. Rubens*, 115 Ill. 196; *Birkett v. Knickerbocker Ice Co.*, 41 Hun 404; *Russell v. Sunbury*, 37 Ohio St. 372, 41 Am. Rep. 523; *Houghkirk v. Delaware, etc. C. Co.*, 92 N. Y. 219, 44 Am. Rep. 370, 12 Am. Neg. Cas. 313; *Etherington v. Prospect Park, etc. R. Co.*, 88 N. Y. 641; *Robel v. Chicago, etc. R. Co.*, 35 Minn. 84, 16 Am. Neg. Cas. 280; *Vicksburg v. McLain*, 67 Miss. 4; *Johnson v. Chicago, etc. R. Co.*, 64 Wis. 425; *Cook v. Clay St. Hill R. Co.*, 60 Cal. 604; *Munroe v. Pacific Coast D. & R. Co.*, 84 id. 515, 18 Am. St. 248; *Schadewald v. Milwaukee, etc. R. Co.*, 55

Wis. 569; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151, 16 Am. Neg. Cas. 643; *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291, 9 Am. Neg. Cas. 491; *Van Brunt v. Cincinnati, etc. R. Co.*, 78 Mich. 530, 16 Am. Neg. Cas. 156; *Scheffler v. Minneapolis, etc. R. Co.*, 32 Minn. 518; *Opsahl v. Judd*, 30 Minn. 126; *Shaber v. St. Paul, etc. R. Co.*, 28 Minn. 103; *Hall v. Galveston, etc. R. Co.*, 39 Fed. 18; *Hutchins v. St. Paul, etc. R. Co.*, 44 Minn. 5, 16 Am. Neg. Cas. 294; *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94; *Pineo v. New York, etc. R. Co.*, 34 Hun 80; *Quinn v. Power*, 29 id. 183; *Bowles v. Rome, etc. R. Co.*, 46 id. 324; *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690; *Pierce v. Conners*, 20 Colo. 178, 46 Am. St. 279; *Mollie Gibson Con. M. & M. Co. v. Sharp*, 5 Colo. App. 321, 13 Am. Neg. Cas. 639; *Duval v. Hunt*, 34 Fla. 85, 13 Am. Neg. Cas. 848; *Bradley v. Sattler*, 156 Ill. 603, 14 Am. Neg. Cas. 321; *Chicago, etc. R. Co. v. Huston*, 196 Ill. 480; *Callaway v. Spurgeon*, 63 Ill. App. 571; *West Chicago St. R. Co. v. Scanlan*, 68 id. 626; *New York, etc. R. Co. v. Mushbrush*, 11 Ind. App. 192, 9 Am. Neg. Cas. 314; *Andrews v. Chicago, etc. R. Co.*, 86 Iowa 677; *Atrops v. Costello*, 8 Wash. 149; *Luessen v. Oshkosh E. L. & P. Co.*, 109 Wis. 94; *Cincinnati St. R. Co. v. Altemeier*, 60 Ohio St. 10; *Kellogg v. Albany & H. R. & P. Co.*, 72 App. Div. (N. Y.) 321.

as is the expense of the education and maintenance of a minor.⁸³ The elements of pecuniary loss sustained by a father in the death of a minor son are the latter's probable earnings during his minority⁸⁴ over and above his support, clothing⁸⁵ and education; the probability of his living, and becoming of sufficient ability to support his father in case of his becoming aged, poor and unable to support himself, at least where liability for such support is imposed by statute if the son is of sufficient ability to furnish it, and the amount he would have brought to his next of kin while living, and their prospect of inheriting from him after his death.⁸⁶ When the circumstances of the case afford a safe standard by which the compensation in damages can be measured, such standard should be given to the jury by stating the reasonable limits within which these calculations should be confined; if such standard is disregarded the verdict will either be reduced or set aside.⁸⁷ Where no reliable standard can

⁸³ *Atrops v. Costello, supra.*

If the deceased was within the terms of a compulsory education statute the jury should be instructed that his attendance at school would have been required in accordance with it. *Bracken v. Pennsylvania R. Co.*, 32 Pa. Super. Ct. 22.

⁸⁴ *Carnego v. Crescent Coal Co.*, 164 Iowa 552.

Evidence of the cost of support and maintenance of the deceased child during minority is competent on the question of damages for her death, including board, clothing, schooling and medical attention. *Lake Erie & W. R. Co. v. Chriss*, 57 Ind. App. 145.

⁸⁵ *Welch v. Maine Cent. R. Co.*, 86 Me. 552, 25 L.R.A. 658, 15 Am. Neg. Cas. 328.

The wages received by a son who had run away from home just prior to his death afford a basis for the recovery of damages in the absence of proof of what he might have earned there or of his aid in sup-

porting his parents. *Dean v. Oregon R. & N. Co.*, 44 Wash. 564.

It is open to the jury to infer that a boy might resume the vocation for which he was trained and, during minority, earn more than he had received. *Knight v. Donnelly*, 131 Mo. App. 152.

⁸⁶ *Keenan v. Brooklyn City R. Co.*, 145 N. Y. 348, 12 Am. Neg. Cas. 328; *Johnson v. Long Island R. Co.*, 80 Hun 306, affirmed without opinion, 144 N. Y. 719.

⁸⁷ *Scotfield v. Pennsylvania Co.*, 149 Fed. 601; *Hirschkovitz v. Pennsylvania R. Co.*, 138 Fed. 438; *Reiter-S. Mfg. Co. v. Hamlin*, 144 Ala. 192; *Illinois Cent. R. Co. v. Johnson*, 221 Ill. 42; *Barnes v. Columbia L. Co.*, 107 Mo. App. 608; *Greenwood v. King*, 82 Neb. 17; *Christensen v. Floriston P. & P. Co.*, 29 Nev. 552; *Cook v. American, etc. G. Co.*, 70 N. J. L. 65; *Coolidge v. New York*, 99 App. Div. (N. Y.) 175; *Hackett v. Wisconsin Cent. R. Co.*, 141 Wis. 464; *Jackson v. Consolidated T. Co.*,

be laid down for the measurement of damages much must be left to the judgment of the jury, and their finding will not be disturbed unless it is such as to show that it is the result of mistake, prejudice or passion.⁸⁸ Where the jury may award such damages as they deem fair and just their discretion will not be interfered with so long as the verdict is within the limit fixed by the statute.⁸⁹

§ 1275. Same subject. In *Ihl v. Forty-second St., etc. R. Co.*,⁹⁰ Rapallo, J., said: "It is within the province of the jury

59 N. J. L. 25; *Seeley v. New York Cent. & H. R. R. Co.*, 8 App. Div. (N. Y.) 402; *Dinnihan v. Lake Ontario Beach I. Co.*, 8 App. Div. (N. Y.) 509; *Graham v. Consolidated T. Co.*, 64 N. J. L. 10; *Rowe v. New York, etc. Tel. Co.*, 66 N. J. L. 19, 9 Am. Neg. Rep. 528; *Kellogg v. Albany & H. R. & P. Co.*, 72 App. Div. (N. Y.) 321.

⁸⁸ *Swan v. Boston Store*, 177 Ill. App. 349; *Missouri, etc. R. Co. v. Henderson* (Tex. Civ. App.), 148 S. W. 822; *Clark v. Tulare Lake D. Co.*, 14 Cal. App. 414; *Illinois Cent. R. Co. v. Warriner*, 132 Ill. App. 301; *Chicago Great Western R. Co. v. Root*, 106 id. 164; *Indianapolis T. & T. Co. v. Beckman*, 40 Ind. App. 100, quoting the preceding propositions; *Ellis v. Republic O. Co.*, 133 Iowa 11; *Draper v. Tucker*, 69 Neb. 434; *Knife & S. Co. v. Hathaway*, 27 Ohio C. C. 745, affirmed without opinion, 72 Ohio 623; *Abby v. Wood*, 43 Wash. 379; *Boucher v. Wisconsin Cent. R. Co.*, 141 Wis. 160; *McCleary v. Pittsburg R. Co.*, 47 Pa. Super. Ct. 366; *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 6 Am. Neg. Cas. 458; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Ohio & M. R. Co. v. Wangelin*, 152 Ill. 138; *Baltimore & O. S. R. Co. v. Then*, 159 Ill. 535; *Terre Haute & I. R. Co. v. Eggmann*, 58 Ill. App. 21; *Andrews v. Chicago, etc. R. Co.*, 86 Iowa 677, Suth. Dam. Vol. V.—7.

686; *St. Louis, etc. R. Co. v. French*, 56 Kan. 584, 15 Am. Neg. Cas. 127; *Atchison, etc. R. Co. v. Cross*, 58 Kan. 42, 3 Am. Neg. Rep. 26; *Sieber v. Great Northern R. Co.* 76 Minn. 269, 274, 7 Am. Neg. Rep. 107; *Leahy v. Davis*, 121 Mo. 227; *Post v. Olmsted*, 47 Neb. 893; *Reger v. Rochester R. Co.*, 2 App. Div. (N. Y.) 5; *Werner v. Brooklyn E. R. Co.*, 11 App. Div. (N.Y.) 86; *Purcell v. Lauer*, 14 App. Div. (N. Y.) 33, 2 Am. Neg. Rep. 57; *Manufacturing Co. v. Morris*, 105 Tenn. 654; *Houston City St. R. Co. v. Sciacca*, 80 Tex. 350; *Oicero & P. St. R. Co. v. Boyd*, 95 Ill. App. 510; *Chicago & E. R. Co. v. Branyan*, 10 Ind. App. 570, 586, 14 Am. Neg. Cas. 542, citing the text; *Kane v. Mitchell T. Co.*, 90 Hun 65, affirmed without opinion, 153 N. Y. 680.

The damage resulting from the death of a child aged three months and dangerously ill from uræmic poisoning are so problematical that no recovery can be allowed. *Scherer v. Schlager*, 18 N. D. 421, 21 Am. Neg. Rep. 338, 24 L.R.A.(N.S.) 520.

⁸⁹ *Chesapeake & O. R. Co. v. Hawkins*, (W. Va.) 98 C. C. A. 443, 174 Fed. 597, 5 N. C. C. A. 156, 26 L.R.A.(N.S.) 309; *Wabash R. Co. v. McDaniels*, — Ind. —, 107 N. E. 291.

⁹⁰ 47 N. Y. 321, 7 Am. Rep. 450.

who had before them the parents, their position in life, the occupation of the father and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present and prospective, resulting to the next of kin. Except in very rare instances it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years [three years and two months]; and to hold without such proof the plaintiff cannot recover would in effect render the statute nugatory in most cases of this description. It cannot be said as matter of law that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exclude any pecuniary advantage which the parent could have derived from his services had he lived. These calculations are for the jury, and any evidence on the subject beyond the age and sex of the child, the circumstances and condition in life of the parents,⁹¹ or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical and would not aid the jury in arriving at a conclusion. It has been held by this court in several similar cases that the statute does not limit the recovery to the actual pecuniary loss proved on the trial.”⁹² Damages should be no more and no less than the next of kin have suffered. Where there is no dependent connection between the deceased and them their poverty and his wealth should not be considered. But where as head of the family he is the family support the jury

⁹¹ *Ewen v. Chicago, etc. R. Co.*, 38 Wis. 625, 12 Am. Neg. Cas. 658.

Substantially the same argument has been made where the action was for the death of an adult son. *Predmore v. Consumers' L. & P. Co.*, 99 App. Div. (N. Y.) 551.

It is a matter of common observation that the children of parents in humble circumstances usually give more pecuniary aid to their parents than children of parents in better circumstances. *Swan v. Boston Store*, 177 Ill. App. 349.

⁹² Citing *Oldfield v. New York, etc. R. Co.*, 14 N. Y. 310, 319, 12 Am. Neg. Cas. 326; *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445, 450, 12 Am. Neg. Cas. 312. To the same effect see *Grogan v. Broadway F. Co.*, 87 Mo. 321; *Nagel v. Missouri Pac. R. Co.*, 75 id. 653, 42 Am. Rep. 418; *Owen v. Brockschmidt*, 54 Mo. 289; *Atkeson v. Jackson Est.*, 72 Wash. 233; *Atrops v. Costello*, 8 Wash. 149.

are entitled to the fullest insight into the family circumstances, and in the absence of special instructions are at liberty to use their best judgment in arriving at results.⁹³ The health of the father of the deceased and the number and ages of his surviving children and the extent to which deceased aided in the support of the family are relevant matters.⁹⁴ In estimating a parent's damages the condition of the family at the time of the accident may be considered, as may the pecuniary value of all acts of kindness and attention which it might reasonably be anticipated the deceased would have performed until he reached his majority.⁹⁵ A parent's recovery is not limited to a nominal sum because his circumstances are such that his need of assistance from the deceased is improbable, nor because his intention as to the education of the deceased was such as to make it probable that the expenditure on his account would have exceeded any pecuniary returns that might reasonably have been expected during minority. The probability of a change in the circumstances of the parent may be taken into consideration.⁹⁶ Payments made by the defendant to the parents of the deceased on account of the death will be deducted; it is otherwise as to insurance money received by them from the defendant's relief department.⁹⁷

⁹³ *Staal v. Grand Rapids, etc. R. Co.*, 57 Mich. 239; *Serensen v. Northern Pacific R. Co.*, 45 Fed. 407; *Gill v. Rochester, etc. R. Co.*, 37 Hun 107; *Phelps v. Winona, etc. R. Co.*, 37 Minn. 485, 5 Am. St. 867; *Shaber v. St. Paul, etc. R. Co.*, 28 Minn. 103; *Opsahl v. Judd*, 30 Minn. 126.

In *Lockwood v. New York, etc. R. Co.*, 98 N. Y. 526, *Earl, J.*, said: "In but few cases arising under this act is the plaintiff able to show direct specific pecuniary loss suffered by the next of kin from the death, and generally the basis of the allowance of damages has to be found in proof of the character, qualities, capacity and condition of

the deceased and in the age, circumstances and condition of the next of kin. The proof may be unsatisfactory and the damages may be quite uncertain and contingent, yet the jurors in each case must take the elements thus furnished and make the best estimate of damages they can."

⁹⁴ *Fitzgerald v. Union S. Co.*, 91 Neb. 493.

⁹⁵ *Ohio Valley T. Co. v. Wernke*, 179 Ind. 49, and local cases cited; *Fox v. Barekman*, 178 Ind. 572.

⁹⁶ *Atkeson v. Jackson Est.*, 72 Wash. 233.

⁹⁷ *Fitzgerald v. Union S. Co.*, 91 Neb. 493.

§ 1276. **Damages recoverable by collateral kindred.** The general principle which underlies all recoveries under the statutes applies with force and is especially emphasized in actions by collateral kindred, that the recovery extends to the value of the reasonable expectation of what they might have received from the deceased had he lived.⁹⁸ In *Chicago & A. R. Co. v. Shannon*⁹⁹ the court said: "If the next of kin are collateral kindred of the deceased and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the degree of relationship may be, only nominal damages¹ can be given, because there has been no pecuniary injury.² If, on the other hand, the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been pecuniary loss, for which compensation under the statute must be given."³ This reasoning is correct if no benefit

⁹⁸ *Graffam v. Saco Grange, Patrons of Husbandry*, No. 53, 112 Me. 508, L.R.A. 1915C 632; *Barnett v. Atlantic City Elec. Co.*, — N. J. L. —, 93 Atl. 108; *Louisville & N. R. Co. v. Summers*, 60 C. C. A. 487, 125 Fed. 719; *Devine v. Chicago City R. Co.*, 153 Ill. App. 382; *Cleveland, etc. R. Co. v. Drumm*, 32 Ind. App. 547; *Missouri, etc. R. Co. v. McLaughlin*, 73 Kan. 248; *Husted v. Missouri Pac. R. Co.*, 143 Mo. App. 623 (ruled under the Kansas statute); *De Luna v. Union R. Co.*, 130 App. Div. (N. Y.) 386; *Steel v. Kurtz*, 28 Ohio St. 191; *Davis v. Guarneri*, 45 id. 470, 481, 4 Am. St. 548; *Opsahl v. Judd*, 30 Minn. 126; *Shaber v. St. Paul, etc. R. Co.*, 28 Minn. 103; *Phelps v. Winona, etc. R. Co.*, 37 Minn. 485, 5 Am. St. 867, 13 Am. Neg. Cas. 848; *Duval v. Hunt*, 34 Fla. 85, 113; *Burk v. Arcata & Mad River R. Co.*, 125 Cal. 364, 73 Am. St. 52.

The proceeds of the decedent's la-

bor, used with his consent for the benefit of sisters with whom he lived, though there was no contract or stipulation on either side for compensation, are a basis on which to award damages if the continuance of the benefit might be expected. *Henry v. Prendergast*, 51 Ind. App. 43.

⁹⁹ 43 Ill. 346.

¹ *Rhoads v. Chicago & A. R. Co.*, 227 Ill. 328; *Chicago B. & I. Co. v. La Mantia*, 112 Ill. App. 43. See § 1264.

² *Romeo v. Western C. & M. Co.*, 157 Ill. App. 67; *In re California N. & I. Co.*, 110 Fed. 670.

³ *Rhoads v. Chicago & A. R. Co.*, 130 Ill. App. 145; *Holton v. Daly*, 106 Ill. 131, 138; *Chicago v. Scholten*, 75 id. 469; *Chicago, etc. R. Co. v. Swett*, 45 id. 197, 204, 14 Am. Neg. Cas. 358.

If collateral kindred were accustomed to receive support and assistance to a considerable extent from the deceased a pecuniary loss is

from the eventual distribution of the estate of the deceased, had he lived, is to be taken into account. Any such benefit depends on three contingencies: that he would have increased his estate, that he would not have made a will to disinherit the widow and next of kin, and that they would survive him.⁴ These contingencies are so important as to preclude the recovery of more than nominal damages where the principal fact in favor of the plaintiff is his heirship to the decedent.⁵ If the collateral kindred are minors the estimate of their damages must not extend beyond their majority.⁶ No presumption of pecuniary loss arises in favor of collateral kindred.⁷ If any of the beneficiaries within the statute who are named in the complaint have sustained such loss their recovery is not limited to a nominal sum.⁸ Where relatives have rendered services to each other and lived together as members of one family there is such dependence as will justify a recovery for the death of one or them though there was no legal obligation to render the services.⁹ The plaintiff in an action under the Illinois Dram-Shop Act may show her financial condition and that of the

shown, the extent of which is largely left to the discretion of the jury. *Terminal R. R. Ass'n v. Condon*, 128 Ill. App. 335.

Where the decedent for several years resided with a widowed sister, paying her for his board, assisting her in buying clothing, giving her money and aiding her in other ways, it was held that the evidence would support a verdict for more than nominal damages. *Whitney v. Chicago Rys. Co.*, 185 Ill. App. 211.

⁴ *Railroad Co. v. Barron*, 5 Wall. 96; *Howard v. Delaware & H. C. Co.*, 6 L.R.A. 75, 40 Fed. 195; *Conklin v. Central New York Tel. & T. Co.*, 130 App. Div. (N. Y.) 308.

⁵ *Burk v. R. Co.*, 125 Cal. 364, 73 Am. St. 52; *In re California N. & I. Co.*, 110 Fed. 670; *Rhoads v. Chicago & A. R. Co.*, 130 Ill. App. 145; *Buzo v. San*

Juan L. & T. Co., 4 Porto Rico Fed. 520. See *Missouri, etc. R. Co. v. McLaughlin*, 73 Kan. 248.

⁶ *Duval v. Hunt*, 34 Fla. 85, 113.

⁷ *Cleveland, etc. R. Co. v. Drumm*, 32 Ind. App. 547; *McCoullough v. Chicago, etc. R. Co.*, 160 Iowa 524, 47 L.R.A.(N.S.) 23 (ruled under the Federal Employers' Liability Act); § 1264.

⁸ *Pittsburgh, etc. R. Co. v. Reed*, 44 Ind. App. 635.

The absence of pecuniary loss on the part of some of the collateral kindred is not cause for denying a recovery to other beneficiaries, who have sustained such a loss though the money recovered is to be distributed according to the statute of descent. *Hegberg v. St. Louis, etc. R. Co.*, 164 Mo. App. 514.

⁹ *Smith v. Michigan Cent. R. Co.*, 35 Ind. App. 188.

decident.¹⁰ In Louisiana the recovery may be for mental suffering and moral loss as well as for the material injury.¹¹ A promise made by the decedent to take his self-supporting next of kin to the country of their birth at his expense is a sufficient basis on which to award them damages.¹² If the sum recovered is to be distributed to the persons and in the proportion provided by law in relation to the distribution of personalty only the persons entitled to share in such distribution are to be considered, regardless of whether voluntary assistance has been rendered others by the deceased.¹³

§ 1277. **Damages to the deceased's estate.** Under statutes like those of Oregon and some other states which authorize the recovery of such damages as result from the death to the estate of the decedent the damages assessed are confined to the pecuniary loss to the estate.¹⁴ If the decedent be a minor no loss on account of his earnings during minority can be taken into account for they would not belong to his estate,¹⁵ and so of a married woman unless she was or had been engaged in an independent occupation.¹⁶ In Kentucky the parents' right to

¹⁰ *Nagle v. Keller*, 141 Ill. App. 444.

¹¹ *Underwood v. Gulf Ref. Co.*, 128 La. 968.

¹² *The O. L. Hallenbeck*, 119 Fed. 468.

¹³ *Richardson v. Detroit & M. R. Co.*, 176 Mich. 413.

¹⁴ *Nicoll v. Sweet*, 163 Iowa 683; *Louisville & N. R. Co. v. Stewart*, 131 Ky. 665.

¹⁵ *Carney v. Concord St. R. Co.*, 72 N. H. 364, 16 Am. Neg. Rep. 212; *De Amado v. Friedman*, 11 Ariz. 56; *Putnam v. Southern Pac. Co.*, 21 Ore. 230, 12 Am. Neg. Cas. 700; *Craft v. Northern Pac. R. Co.*, 25 Ore. 275; *Tutwiler C. C. & I. Co. v. Enslen*, 129 Ala. 336; *Morris v. Chicago, etc. R. Co.*, 26 Fed. 23. In the last case a married woman was also killed, and an action was brought to recover damages to her

estate on account of her death. The right of the husband to her earnings was not mentioned as affecting the question of damages.

¹⁶ *Myers v. Chicago, etc. R. Co.*, 152 Iowa 330; *Nolte v. Chicago, R. I. & P. R. Co.*, 165 Iowa 721.

Where the decedent up to the time of her marriage was a trained nurse, there was no presumption that she had thereby permanently abandoned her profession, and the jury may properly consider her probable earnings thereby if she should in the future engage actively in such profession; but they must also consider the fact that her family duties will naturally interfere somewhat with her earnings in her profession if she engages in it after marriage. *Nolte v. Chicago, R. I. & P. R. Co.*, 165 Iowa 721.

the services of a minor ceases with his death. His life expectancy is his own. The award of compensation does not proceed upon the basis of the value of his labor, but for the loss of the power to earn money after attaining his majority, which was the decedent's alone.¹⁷ Though the damages recoverable for the loss of such power are difficult of proof, they are of certain and substantial value.¹⁸ Where the general rule prevails, the age, health, habits of industry, economy and sobriety, the mental and physical skill of the deceased and his character, so far as they affect his capacity for rendering useful service to others or acquiring property, must be considered.¹⁹ The capacity of the deceased to earn money is not the sole consideration upon which the assessment of compensation is to be made; the test is such sum as will reasonably remunerate his estate for the destruction of his earning power in view of all the facts.²⁰ The age of the

¹⁷ *Louisville & N. R. Co. v. Engleman*, 146 Ky. 19.

¹⁸ *Louisville & N. R. Co. v. Kimble*, 140 Ky. 759, sustaining a judgment for \$6,000 in favor of the administrator of a girl aged nine years.

¹⁹ *Clark v. Iowa Cent. R. Co.*, 162 Iowa 630; *Hough v. Illinois Cent. R. Co.*, 169 Iowa 224; *Carter v. Sioux City S. Co.*, 160 Iowa 78 (emphasizing age and earning capacity); *Gray v. Chicago, etc. R. Co.*, 160 Iowa 1; *Jennings v. Alaska Treadwell G. M. Co.*, 95 C. C. A. 388, 170 Fed. 146; *Phoenix R. Co. v. Landis*, 13 Ariz. 80; *De Amado v. Friedman*, *supra*; *Skonieczny v. Churchman*, 7 Pennew. (Del.) 226; *Jacksonville E. Co. v. Bowden*, 54 Fla. 461, 15 L.R.A.(N.S.) 451 (also means and business); *Hammer v. Janowitz*, 131 Iowa 20, 20 Am. Neg. Rep. 324; *Farrell v. Chicago, etc. R. Co.*, 123 Iowa 690, 16 Am. Neg. Rep. 318 (sustaining a judgment for \$3,000 for the death of a girl of eight years); *Cincinnati, etc. R. Co. v. Lovell*, 141 Ky. 249; *Holmes v.*

Oregon, etc. R. Co., 6 Sawyer 293, 5 Fed. 528; *Andrews v. Chicago, etc. R. Co.*, 86 Iowa 677; *McGhee v. Willis*, 134 Ala. 281; *Louisville & N. R. Co. v. Millett*, 20 Ky. L. Rep. 532; *Carlson v. Oregon S. L., etc. R. Co.*, 21 Ore. 450; *Ladd v. Foster*, 12 Sawyer 547, 31 Fed. 827; *Holland v. Brown*, 13 Sawyer, 284, 35 Fed. 43; *Tutwiler C., etc. Co. v. Enslin*, *supra*.

A female school teacher 44 years of age is likely to be of good habits. *Clark v. Iowa Cent. R. Co.*, 162 Iowa 630.

The fact that decedent could not obtain life insurance on account of his health is competent on the question of his expectancy of life and ability to labor, though of small importance. *Nicoll v. Sweet*, 163 Iowa 683.

Habits of economy and the disposition made by the deceased of his earnings are material, if not controlling, factors. *Central R. Co. v. Alexander*, 144 Ala. 257.

²⁰ *Louisville & N. R. Co. v. Kenney's Adm'r*, 162 Ky. 403; *Louis-*

deceased will not prevent a recovery for loss of earning capacity unless there is affirmative evidence of the absence of it; the jury may infer its existence to some degree.²¹ In Connecticut the damages recoverable are based on the injury to the deceased, and not on the loss to his wife and children.²² The principal element of damage is the loss of earning capacity resulting to the deceased, and thus, in a sense to his estate. On this question, evidence as to his age, character and health is admissible,²³ as is evidence of the employment he had been engaged in. It may be assumed that his earnings after attaining majority would have been much more than the cost of his personal support. Judicial notice has been taken of the expectation of life as disclosed by mortality tables.²⁴

ville & N. R. Co. v. Stewart's Adm'r, 156 Ky. 550, [modified on rehearing on other grounds, 157 Ky. 642]; Bettinger v. Loring, 168 Iowa 103; Hough v. Illinois Cent. R. Co., 169 Iowa 224; Illinois Cent. R. Co. v. Dallas, 150 Ky. 442; Cincinnati, etc. R. Co. v. Lovell, *supra*; Louisville & N. R. Co. v. Simrall, 127 Ky. 55; Louisville & N. R. Co. v. Eakin, 103 Ky 465, 479; Smith v. Middleton, 23 Ky. L. Rep. 2010.

In a late Kentucky case it was held that an instruction that loss of power of the deceased was the only fact to be considered in assessing damages in an action brought by an administrator for the death of the deceased, though differing from the usual form of instruction approved in Kentucky, which followed the rule laid down in the text, was held not sufficiently erroneous to be prejudicial. Louisville & N. R. Co. v. Kenny's Adm'r, 162 Ky. 403. An instruction following the rule in the text was approved in Chesapeake & O. R. Co. v. Dwyer's Adm'r, 157 Ky. 590.

What one whose life is prematurely taken might have saved had

he lived is the test given by all the books. It has reference primarily to ability or power and not to amount. Hough v. Illinois Cent. R. Co., 169 Iowa 224.

²¹ Chesapeake & O. R. Co. v. Bank, 153 Ky. 625.

²² McElligott v. Randolph, 61 Conn. 157.

²³ Broughel v. Southern New England Tel. Co., 73 Conn. 614, 29 Am. St. 181; Florida Cent. & P. R. Co. v. Sullivan, 57 C. C. A. 167, 120 Fed. 799, 61 L.R.A. 410; Callison v. Brake (Fla.), 63 C. C. A. 354, 129 Fed. 196.

²⁴ Nelson v. Branford L. & W. Co., 75 Conn. 548, 13 Am. Neg. Rep. 490.

In the case of a young man it is not to be assumed that there would not be an increase in his earning capacity, or that he would not make and save more than he was doing just previous to his death. "In dealing with the wrongdoer the law requires him to give the injured person or his estate such a sum as under the most favorable conditions will compensate him or his estate for the loss occasioned by his wrongful act." Cincinnati, etc. R. Co. v. Lovell, 141 Ky. 249.

The only element of damage where the recovery is for the benefit of the estate of the decedent is the present value of his earning power.²⁵ There has been some divergence of decision concerning the taking into account of the living expenses of the deceased. It has been said that "a court could not well enter into such an inquiry. It would at least involve an investigation of the condition in life of the decedent, and it seems to us embark the court upon a sea of speculation almost without limit."²⁶ In a later case the court said that, if the question were new, it would hold that there ought to be an instruction to consider the necessary and economical living expenses of the deceased had he not been killed; but as instructions not containing such language had been approved and under them the jury might consider such expenses, it refused to reverse the judgment for the failure to specifically instruct to that effect.²⁷ A more recent case clearly recognizes that the net gain to the estate is the test, and that in determining what that might be the extra-hazardous employment of the deceased is a factor.²⁸ In Kentucky it is not competent to prove that the decedent had a wife and children depending upon him for support.²⁹ But in New Hampshire it is said: The amount to be recovered is not lessened by the fact that the person had a family dependent upon him for support. It is true that such a man might have less opportunity to save than one who had no family. But this statute is to have a reasonable construction. It does not mean that, when two men of equal earning capacity are killed, there is to be no substantial recovery for the benefit of the ten orphans left by the one, while a large sum is distributed to the cousins

²⁵ Louisville, etc. R. Co. v. Case, 9 Bush 728; Louisville & N. R. Co. v. Milet, 20 Ky. L. Rep. 532; Hammer v. Janowitz, 131 Iowa 20; Helena G. Co. v. Rogers, 104 Ark. 59; Louisville & N. R. Co. v. Setser, 149 Ky. 162.

²⁶ Louisville & N. R. Co. v. Morris, 14 Ky. L. Rep. 466; Imbriani v. Anderson, 76 N. H. 491.

²⁷ Chesapeake & O. R. Co. v. Lang,

100 Ky. 221, 19 Ky. L. Rep. 65; Louisville & N. R. Co. v. Kelly, 100 Ky. 421, 19 Ky. L. Rep. 69; Same v. Eakin; Cincinnati, etc. R. Co. v. Lovell, *supra*.

²⁸ Stewart v. L. & N. R. Co., 136 Ky. 717; Linge v. Alaska Treadwell Co., 3 Alaska 9.

²⁹ Louisville & N. R. Co. v. Eakin, *supra*; Same v. Shumaker, 21 Ky. L. Rep. 803.

of the other.³⁰ And in Iowa if it is shown that deceased had not saved anything from his earnings the fact may be explained by showing that he had supported a dependent family.³¹ In some states the jury may regard the fact whether the deceased was married or single, as well as the number of decedent's children,³² and the recovery is limited to the present worth of his life. In fixing that the living expenses of the deceased are to be regarded and also future impairment of his earning ability.³³ The rule in Oregon is to much the same effect, with the exception that the damages, because they are required to be administered as other personal property of the deceased, are not to be measured by a sum which, if put at interest, would yield a sum equivalent to the annual savings of the deceased during the probable length of his life. The opinion was expressed that no rule can be laid down by which the damages can be ascertained with even approximate mathematical certainty; the amount must depend upon the good sense and judgment of the jury with regard to the facts of each case.³⁴ The decreased purchasing power of money has been said to be a reason for looking upon verdicts for large sums with more favor than formerly.³⁵ Nominal damages are a sufficient compensation only when the estate has no distributees. The presumption is that an infant has a father who supports his child and receives his earnings.³⁶ In Missouri there can be no recovery at all by an

³⁰ *Imbriani v. Anderson*, 76 N. H. 491.

³¹ *Dupree v. Wabash R. Co.*, 155 Iowa 544.

³² *Nicoll v. Sweet*, 163 Iowa 683. The evidence is competent only as tending to show an incentive to thrift and accumulation. *Nicoll v. Sweet*, *supra*.

³³ *Wheelan v. Chicago, etc. R. Co.* 85 Iowa 167; *Lowe v. Same*, 89 Iowa 420; *Florida Cent. & P. R. Co. v. Sullivan*, *Callison v. Brake*, *supra*.

The cost of living is a matter of such common observation that a jury would have some reasonable idea about it, so that if evidence is

offered as to the cost of board, etc., the jury would not have been bound to follow the evidence, but might use their own judgment in connection with it. *Clark v. Iowa Cent. R. Co.* 162 Iowa 630.

³⁴ *Carlson v. Oregon S. L., etc. R. Co.*, 21 Ore. 450; *De Amado v. Friedman*, 11 Ariz. 56; *Louisville & N. R. Co. v. Kimble*, 140 Ky. 759. See *Cincinnati, etc. R. Co. v. Lovell*, 141 Ky. 249.

³⁵ *Louisville & N. R. Co. v. Engleman*, 146 Ky. 19.

³⁶ *Tutwiler C., etc. Co. v. Enslen*, 129 Ala. 336.

administrator for the death of his intestate where there is no proof of any known persons capable of receiving the amount to be recovered, for whose benefit the action may be prosecuted.³⁷

§ 1278. **Special damages.** If some special injury results proximately from the death to any or all of the beneficiaries recovery may be had therefor. Thus, in *Pym v. Great Northern R. Co.*,³⁸ a change in the mode of distributing property among the members of a family, produced by the death complained of, although no pecuniary loss to the family in the aggregate would result and none would have arisen from the injury to the decedent had he lived, yet it being an injury resulting from the death, it was an injury to be compensated. So in a Wisconsin case where a widow's pension was reduced by the death of her child, in an action under the statute for damages resulting to her from the death of that child she was entitled to have this loss included in her recovery.³⁹ But in a New Jersey case the damages resulting from the dissolution of a valuable partnership, by the death complained of, was not within the scope of the statute, which was held to give damages resulting from the severance of a relation of kinship, and not of contract.⁴⁰ It has also been ruled that funeral expenses, if recoverable at all, must be claimed in the pleadings as special damages.⁴¹ The medical expenses incurred by or on behalf of the deceased cannot be recovered.⁴²

§ 1279. **Contracts exempting from liability.** The cases bearing upon the validity of contracts between master and servant which affect the liability of the former to the family of the latter for damages under Lord Campbell's act and the American statutes modeled upon it are collected elsewhere.⁴³

³⁷ *Troll v. Laclède Gas Light Co.*, 182 Mo. App. 600. The fact of the existence of such persons must be alleged as well as proved, and a petition not containing such allegations was properly held bad on demurrer. *Troll v. Laclède Gas Light Co.*, *supra*.

³⁸ 2 B. & S. 759, 4 id. 396.

³⁹ *Ewen v. Chicago, etc. R. Co.*, 38

Wis. 613, 12 Am. Neg. Cas. 658; *Rowley v. London, etc. R. Co.*, L. R. 8 Ex. 221.

⁴⁰ *Deamarest v. Little*, 47 N. J. L. 28, 16 Am. Neg. Cas. 643, 668.

⁴¹ *Gay v. Winter*, 34 Cal. 153.

⁴² *Pulling v. Great Eastern R. Co.*, 9 Q. B. Div. 110; *Pittsburgh, etc. R. Co. v. Brown*, 178 Ind. 11.

⁴³ See § 6.

§ 1280. Where the injury is done in another state. These statutes have no extra-territorial effect. It is, however, a general principal that where, either by common law or statute, a right of action has become fixed and a legal liability incurred, if transitory, it may be enforced in the courts of any state in which jurisdiction of the defendant can be obtained, provided it is not against the public policy of the state where it is sought to be enforced. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action,⁴⁴ while all that pertains merely to the

⁴⁴ *Missouri Pac. R. Co. v. Larussi*, 88 C. C. A. 230, 161 Fed. 66; *Keep v. National T. Co.*, 154 Fed. 121; *St. Louis, etc. R. Co. v. Hesterly*, 98 Ark. 240; *Harrill v. South Carolina, etc. R. Co.*, 132 N. C. 655, 16 Am. Neg. Rep. 155; *Whitlow v. Nashville, etc. R. Co.*, 114 Tenn 344, 68 L.R.A. 503; *Texas, etc. R. Co. v. Miller* (Tex. Civ. App.), 128 S. W. 1165; *In re Lowham's Est.*, 30 Utah 436; *Stone v. Union Pac. R. Co.*, 32 Utah 185; *Norfolk & W. R. Co. v. Denny*, 106 Va. 383; *Suth. on Stat. Const.*, § 14; *Herrick v. Minneapolis, etc. R. Co.*, 31 Minn. 11, 16 Am. Neg. Cas. 292, 47 Am. Rep. 771; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. ed. 439; *Wooden v. Western, etc. R. Co.*, 126 N. Y. 10, 16 Am. Neg. Cas. 806, 22 Am. St. 803, 13 L.R.A. 458; *Leonard v. Columbia St. N. Co.*, 84 N. Y. 48, 38 Am. Rep. 491, 9 Am. Neg. Cas. 587; *Knight v. West Jersey R. Co.*, 108 Pa. 250, 56 Am. Rep. 200; *Central R. Co. v. Swint*, 73 Ga. 651; *Morris v. Chicago, etc. R. Co.*, 65 Iowa 727, 54 Am. Rep. 39; *Shedd v. Moran*, 10 Ill. App. 618, 14 Am. Neg. Cas. 334; *Hanna v. Grand Trunk R. Co.*, 41 Ill. App. 116; *Ramsey v. Glenn*, 33 Kan. 271; *Boyce v. Wabash R. Co.*, 63 Iowa 70, 50 Am. Rep. 730; *Keenan v. Stimson*, 32 Minn. 377; *Bishop v. Globe Co.*, 135

Mass. 132; *Taylor v. Pennsylvania Co.*, 78 Ky. 348, 39 Am. Rep. 244; *Chicago & E. I. R. Co. v. Rouse*, 178 Ill. 132, 5 Am. Neg. Rep. 549, 44 L.R.A. 410; *Nicholas v. Burlington, etc. R. Co.*, 78 Minn. 43; *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958; *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 42 L. ed. 537; *Van Doren v. Pennsylvania R. Co.*, 35 C. C. A. 282, 93 Fed. 260. See *Willis v. Missouri Pa. R. Co.*, 61 Tex. 432, 48 Am. Rep. 301; *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679, 54 Am. Rep. 105; *Martin v. Kansas City, etc. R. Co.*, 77 Miss. 720; *Thorpe v. Union Pac. Coal Co.*, 24 Utah 475; *Usher v. West Jersey R. Co.*, 126 Pa. 206, 4 L.R.A. 261, 12 Am. St. 863; *Boulden v. Pennsylvania R. Co.*, 205 Pa. 264.

The statutes of one state giving a right of action for wrongful death may be enforced in the federal courts of another state if not inconsistent with the statutes and policy thereof. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829.

There was formerly some hesitation about entertaining such actions because of the view that they were penal in their nature; later, the view was held that the statutes giving the right of action were remedial, and actions based upon them

remedy will be controlled by the law of the state where the action is brought.⁴⁵ This rule applies in some states to the amount recoverable if a limitation is fixed by the law of the forum;⁴⁶ but it may be otherwise if the action is brought upon the statute of the state in which the death occurred.⁴⁷ As the remedy given by these statutes is one for a loss which the common law is generally regarded as defective in not providing compensation for, it would seem to come within this comity to permit a recovery for such a cause accruing in another state under the laws thereof, though in the state where the action is brought no such correction of the common law had been adopted, or a law for that purpose had been enacted which was materially different from that under which the alleged cause of action arose.⁴⁸ But in a majority of the cases decided in the state courts it is regarded as necessary, where the action is brought

were maintainable in another jurisdiction if there was in force therein a substantially similar statute. "The present tendency of the more recent decisions is to advance still further towards liberality and to throw open the courts to litigants whose cause of action has arisen in other states and under the laws thereof, even though not actionable at common law if it had arisen in the *forum*, provided the enforcement of the *lex delicti* would not seriously contravene the established policy of the *forum*. The presumption is in favor of the right to sue, and the burden rests upon the party objecting to show that the enforcement of the 'proper law' would be inconsistent with the domestic policy." Minor on Conf. of Laws, § 200.

⁴⁵ *Id.*; Burlington, etc. R. Co. v. Thompson, 31 Kan. 180, 47 Am. Rep. 497; Mooney v. Union Pac. R. Co., 60 Iowa 346.

⁴⁶ Wooden v. R. Co., 126 N. Y. 10; Northern Pac. R. Co. v. Babcock, *supra*.

⁴⁷ Howey v. New England N. Co., 83 Conn. 278. See Christensen v. Floriston P. & P. Co., 29 Nev. 552.

If the contributory negligence of the deceased will mitigate the damages in the state in which his death occurred the same consequence will follow in an action brought in another state. Louisville & N. R. Co. v. Whitlow, 105 Ky. 1.

⁴⁸ Dennick v. Railroad Co., 103 U. S. 11, 26 L. ed. 439; Herrick v. Minneapolis, etc. R. Co., 31 Minn. 11, 47 Am. Rep. 771; Burrell v. Fleming, 47 C. C. A. 598, 109 Fed. 489, 14 Am. Neg. Rep. 701; St. Louis, etc. R. Co. v. Haist, 71 Ark. 258; The E. B. Ward, Jr., 16 Fed. 255; King v. Sarria, 69 N. Y. 24, 25 Am. Rep. 128; Wall v. Hoskins, 5 Ired. 177; Lowry v. Inman, 46 N. Y. 119; Stewart v. Baltimore & O. R. Co., 168 U. S. 445, 42 L. ed. 537; Wooden v. R. Co., 126 N. Y. 10, 16 Am. Neg. Cas. 806, 13 L.R.A. 458, 22 Am. St. Rep. 803; Southern R. Co. v. Decker, 5 Ga. App. 21.

in another state than that where the death was caused, that the laws of the latter be shown and that they provide a remedy substantially the same as do the laws of the state where the action is brought.⁴⁹ This rule governs though the deceased was a resident of the jurisdiction of the forum and died therein, if the injury was sustained in another jurisdiction.⁵⁰ The courts of Ohio will not determine a case brought by an administrator of one killed in another state unless it be shown that such state allows the enforcement in its courts of Ohio statutes of like character. It is not enough to show merely that the courts of that state entertain actions to recover for wrongful killing in another state,⁵¹ and an action cannot be maintained

⁴⁹ *Zeikus v. Florida E. C. R. Co.*, 153 App. Div. (N. Y.) 345; *Strauss v. New York, etc. R. Co.*, 91 App. Div. (N. Y.) 583; *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679, 54 Am. Rep. 105; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85; *St. Louis, etc. R. Co. v. McCormick*, 71 Tex. 660, 1 L.R.A. 804; *McCarthy v. Chicago, etc. R. Co.*, 18 Kan. 46, 26 Am. Rep. 742; *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848, 2 L.R.A. 67; *Selma, etc. R. Co. v. Lacy*, 43 Ga. 461, 14 Am. Neg. Cas. 111; *State v. Pittsburgh, etc. R. Co.*, 45 Md. 41; *Oates v. Union Pac. R. Co.*, 104 Mo. 514, 16 Am. Neg. Cas. 487; *Barker v. Hannibal, etc. R. Co.*, 91 Mo. 86; *Woodard v. Michigan, etc. R. Co.*, 10 Ohio St. 121; *Wooden v. Western, etc. R. Co.*, 126 N. Y. 10, 16 Am. Neg. Cas. 806, 13 L.R.A. 458, 22 Am. St. Rep. 803; *Cincinnati, etc. R. Co. v. McMullen*, 117 Ind. 439, 14 Am. Neg. Cas. 558, 10 Am. St. 67; *O'Reilly v. New York, etc. R. Co.*, 16 R. I. 388, 5 L.R.A. 364; *Hover v. Pennsylvania Co.*, 25 Ohio St. 667; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Nashville, etc. R. Co. v. Eakin*, 6 Cold. 582; *Vanderwerkin v. New York, etc. R. Co.*, 6 Abb. Pr. 239; *Lockwood v. New*

York, etc. R. Co., 98 N. Y. 523; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Mackay v. Central R. Co.*, 4 Fed. 617; *Taylor v. Pennsylvania Co.*, 78 Ky. 348, 39 Am. Rep. 244 (compare *Bruce v. Cincinnati R. Co.*, 83 Ky. 174); *Western, etc. R. Co. v. Strong*, 52 Ga. 461; *Chicago, etc. R. Co. v. Doyle*, 60 Miss. 977; *Nashville, etc. R. Co. v. Sprayberry*, 8 Baxter 341; *Patton v. Pittsburgh, etc. R. Co.*, 96 Pa. 169; *Knight v. West Jersey R. Co.*, 108 id. 250; *Mexican Nat. R. Co. v. Slat-ter*, 53 C. C. A. 239, 115 Fed. 593.

The policy of the state in which a federal court sits will govern it in enforcing a cause of action arising under the statutes of another state. *Gallagher v. Florida E. C. R. Co.*, 196 Fed. 1000.

⁵⁰ *De Harn v. Mexican National R. Co.*, 86 Tex. 68; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *McCarthy v. Chicago, etc. R. Co.*, 18 Kan. 46; *Van Doren v. Pennsylvania R. Co.*, 35 C. C. A. 282, 93 Fed. 260; *Hegerich v. Keddle*, 99 N. Y. 258, 267.

⁵¹ *Wabash R. Co. v. Fox*, 64 Ohio St. 133, 9 Am. Neg. Rep. 593, ruled under § 6134a, R. S.; *St. Bernard v. Shane*, 201 Fed. 453 (the federal

in Ohio where the death occurs in another state unless the decedent was a citizen of Ohio.⁵² A statute providing for the bringing of an action for a death caused in the state in some court thereof, does not bar the right to maintain an action for a death which occurred in another state as the result of a wrongful act done in the state in which it was in effect.⁵³ A statute which imposes liability to the extent of a fixed sum for the loss of life is in part penal in its nature, and will not be enforced by the courts of another jurisdiction than that which enacted it.⁵⁴ That part of it which is compensatory cannot be enforced in a foreign jurisdiction because the liability would rest on the statute and the measure of it would be determined by the law of the forum.⁵⁵ A non-resident may recover compensatory damages though the laws of the state in which the death occurred allowed punitive damages, the latter not being asked for.⁵⁶

If a foreign corporation extends its railroad into an adjoining state on condition that suit may be brought against it in the state into which it goes on all claims upon it, suits may be brought there by citizens of the state of its domicile upon a cause of action arising in the latter under its statute. If such statute does not require a prosecution as a condition precedent to recovery for the death it will not be required by the court of the state in which the action is brought.⁵⁷ The homicide of a person in another state on a line of railroad owned and oper-

courts will follow the rule of the court of the state in which they sit).

⁵² *Baltimore & O. R. Co. v. Chambers*, 73 Ohio St. 16, 19 Am. Neg. Rep. 478, 11 L.R.A.(N.S.) 1012.

⁵³ *Rudiger v. Chicago, etc. R. Co.*, 94 Wis. 191; *Crane v. Chicago, etc. R. Co.*, 233 Ill. 259.

⁵⁴ *Raisor v. Chicago & A. R. Co.*, 215 Ill. 47, 106 Am. St. 153.

⁵⁵ *Dale v. Atchison, etc. R. Co.*, 57 Kan. 601, 1 Am. Neg. Rep. 46; *Matheson v. Kansas City, etc. R. Co.*, 61 Kan. 667, 7 Am. Neg. Rep. 630.

⁵⁶ *Rochester v. Wells Fargo & Co. Exp.*, 87 Kan. 164, 40 L.R.A.(N.S.) 1095.

Where the right of action accrued in a state where by statute punitive damages might have been recovered, and the action is in a state where the statute does not permit such recovery, only compensatory damages may be recovered. The decision is put on the ground of a waiver by bringing action in another state. *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa 155.

⁵⁷ *South Carolina R. Co. v. Nix*, 68 Ga. 572.

ated by a Georgia company is actionable in the latter state.⁵⁸ A right of action given by the laws of one state will not be enforced in the courts of another if it is denied by the common law and is not given by the statutes of the latter.⁵⁹ It is presumed that the common law is in force in a sister state; if rights are claimed under the statutes thereof they must be proved.⁶⁰

⁵⁸ *Central R. v. Swint*, 63 Ga. 651.

⁶⁰ *Murray v. Louisville & N. R.*

⁵⁹ *Texas & P. R. Co. v. Richards*,

68 Tex. 375.

Co., 132 Ky. 336.

CHAPTER XXXVIII.

SEDUCTION, CRIMINAL CONVERSATION AND ALIENATION OF AFFECTIONS.

§ 1281. The technical not the real gist of the action for seduction.

1282 Who may maintain the action.

1283. Evidence for plaintiff, and damages recoverable. .

1284. Evidence for defendant in mitigation.

1285. Criminal conversation and alienation of affections.

§ 1281. The technical not the real gist of the action for seduction. At common law the action for seduction rests on the relation of master and servant, and proceeds in form for loss of service. Trespass *vi et armis* is deemed proper where the servant resides with the master or parent; case may also be brought where the injury is not committed with force, or where the servant is only constructively in the master's service.¹ Slight evidence will establish sufficiently the relation, and the extent of the loss of service is not the measure of damages.² The allegations and proof on these points are almost an unmeaning formula—an obeisance to a shadow of the past—to reach the actual grievance. The action in reality is to afford redress for the injury done to the parent or other near relative or person standing *in loco parentis* for the dishonor and degradation suffered by the family in consequence of the seduction.³ And large damages, which the court will seldom relieve against,⁴ are recoverable, both for recompense to the plaintiff and punishment to the defendant. Caton, J., said: "Technically, the

¹ Briggs v. Evans, 5 Ired. 16; Parker v. Meek, 3 Sneed 29; Mercer v. Walmsley, 5 Har. & J. 27, 9 Am. Dec. 486; Magninay v. Saudek, 5 Sneed 146; Sutton v. Huffman, 32 N. J. L. 58; Greenwood v. Greenwood, 28 Md. 369; Bartley v. Richtmyer, 4 N. Y. 38; Cooley on Torts, 232, 233; Emery v. Gowen, 4 Me. 33, 16 Am. Dec. 233; Clough v. Tenney, 5 Me. 446.

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² Coon v. Moffett, 3 N. J. L. (*583) 169; Badgley v. Decker, 44 Barb. 577; Holliday v. Parker, 23 Hun 72, 73; Bayles v. Burgard, 48 Ill. App. 371; Garretson v. Becker, 52 id. 255.

³ Willeford v. Bailey, 132 N. C. 402.

⁴ Id.; Bennett v. Beam, 42 Mich. 346; Sargent v. —, 5 Cow. 106; Luther v. Shaw, 157 Wis. 234, 52 L.R.A.(N.S.) 85, citing the text.

ground of recovery is the loss of the services of the daughter, and the rule of the books seems to be that the father must prove some service in order to entitle him to maintain the action. This is nominally the ground on which the plaintiff's right of action rests, while practically, the right to recover rests on far higher grounds, that is, the relation of parent and child, or guardian and ward, or husband and wife, as well as that of master and servant; and it seems almost beneath the dignity of the law to resort to a sort of subterfuge to give the father a right of action which is widely different from that for which he is really allowed to recover damages.⁵ But the law may still require proof of service, or at least the right to service when the child is a minor; but this, as well as any other fact, may be proved by circumstances sufficient in themselves to satisfy the jury that the party seduced did actually render service to the plaintiff, and the most trivial service has always been held sufficient."⁶ Even in England, where stricter proof of service is required, Blackburn, J., said: "In effect the damages are given to the plaintiff as standing in the relation of parent; and the action has at present no reference to the relation of master and servant beyond the mere technical point on which the action is founded."⁷ This is according to the general current of authority.⁸ While the courts adhere so far to the original distinctive character of the action as to require proof that the seduced female was in the service of the plaintiff at the time of the seduction they do not require strict proof; very slight evidence of loss of service suffices in favor of one standing *in loco parentis* and who is affected by the graver consequences of the seduction.⁹ The actual loss sustained by the plaintiff,

⁵ See § 1282,

⁶ Doyle v. Jessup, 29 Ill. 462; Cook v. Bartlett, 179 Mass. 576; Willeford v. Bailey, *supra*; Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288; Hewit v. Prime, 21 Wend. 79; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Herring v. Jester, 2 Houst. 66.

⁷ Terry v. Hutchinson, L. R. 3 Q. B. 602.

⁸ Ellington v. Ellington, 47 Miss. 329; Patterson v. Thompson, 24 Ark. 55; Keller v. Donnelly, 5 Md. 211; Paterson v. Wilcox, 20 Up. Can. C. P. 385; Phillips v. Hoyle, 4 Gray 568; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100.

⁹ Davidson v. Goodall, 18 N. H. 427; Hewit v. Prime, 21 Wend. 79; Clark v. Fitch, 2 id. 459, 20 Am. Dec. 639; Gray v. Durland, 51 N. Y.

through the diminished ability of his daughter, relative or ward to yield him personal service, as well as the servile position of the supposed servant herself in the family of her protector, is ordinarily little more than a mere fiction. It is one of those cases in which an action devised for one purpose has been found to serve a different one by the aid of the discretion which courts have assumed in instructing the jury, and the readiness of the jury to render substantial justice by their verdict, where the forms of law imposed by the instructions of the court admit of their doing so.¹⁰

§ 1282. **Who may maintain the action.** The person seduced, whether a minor or of full age, cannot ordinarily maintain an action for her own seduction; she, being a partaker in the offense, cannot, it is said, come into court to obtain satisfaction for a supposed injury to which she consented.¹¹ The only mode in which the action has ever been maintained, except in pursuance of some statute,¹² unless it was against the general guardian of the ward who was seduced, in which case it has been ruled that she might maintain an action against him to recover for her seduction while she was under the age of consent and a member of his household,¹³ has been by bringing it in the name

424; *Anderson v. Rigg*, 64 N. J. L. 407; *Snider v. Newell*, 132 N. C. 614.

¹⁰ *Davidson v. Goodall*, 18 N. H. 427.

¹¹ *Larocque v. Conheim*, 42 N. Y. Misc. 613; *Oberlin v. Upson*, 84 Ohio 111; *Oleszefski v. Taylor*, 19 Pa. Dist. 145; *Paul v. Frazier*, 3 Mass. 71, 3 Am. Dec. 95; *Woodward v. Anderson*, 9 Bush 624; *Hamilton v. Lomax*, 26 Barb. 615; *Smith v. Richards*, 29 Conn. 232, 240; *Buckles v. Ellers*, 72 Ind. 220; *Weaver v. Bachert*, 2 Pa. 80; *Ellington v. Ellington*, 47 Miss. 329; *Ingwaldson v. Skrivseth*, 7 N. D. 388; *Conlon v. Cassidy*, 17 R. I. 518. See *Fidler v. McKinley*, 21 Ill. 308.

¹² Provision has been made by statute in Michigan, Indiana, Cali-

fornia, Alabama, Iowa, Oregon, Tennessee, and perhaps other states, for actions by the female seduced, in which she is permitted to recover such damages as juries may allow her. See 4 Am. Rep. 406; *Breon v. Henkle*, 14 Ore. 494; *Franklin v. McCorkle*, 16 Lea 609, 57 Am. Rep. 244, and *Harrison v. Prentice*, 28 Ont. App. 140, 24 Ont. App. 677, as to the loss of service under the statute of Ontario.

In Iowa if the plaintiff yields because of any seductive arts the fact that some force was used does not defeat a recovery. *Verwers v. Carpenter*, 166 Iowa 273.

¹³ *Graham v. Wallace*, 50 App. Div. (N. Y.) 101. See *Brattain v. Cannady*, 96 Ind. 266.

of some person having a right to the services of the person seduced; and in that action damages are recoverable, not only for actual loss of service, but for a sum sufficient to punish the seducer.¹⁴ The action cannot be maintained by the fiancée of the person seduced.¹⁵ The cause of action given an infant female by statute does not bar an action by her father for the same act for which she may sue.¹⁶ He has a right to the services of his minor daughter, and may maintain the action without proof of actual service, and, although she were at service away from home, if he had not divested himself of the right to recall her to his service.¹⁷ He will not be deprived of his remedy though death results from the pregnancy following the seduction.¹⁸ If the daughter marries another person than her seducer, prior to her father's loss of service or expenditure on account of the seduction, he cannot maintain an action, because he has no claim to her services after marriage,¹⁹ unless his consent thereto was obtained by fraud.²⁰ A mother in case of the father's death has the same right to the services of her child as the father would have if living,²¹ and may sue for her seduction.

¹⁴ *Hamilton v. Lomax*, 26 Barb. 615.

¹⁵ *Case v. Smith*, 107 Mich. 416, 61 Am. St. 341, 31 L.R.A. 282.

¹⁶ *Watson v. Watson*, 49 Mich. 540, 544; *Bartlett v. Kochel*, 88 Ind. 425; *Anderson v. Aupperle*, 51 Ore. 556, citing the text.

¹⁷ *Simpson v. Grayson*, 54 Ark. 404, 26 Am. St. 52; *Lawyer v. Fritcher*, 130 N. Y. 239, 27 Am. St. 521, 14 L.R.A. 700; *Martin v. Payne*, 9 Johns. 387, 6 Am. Dec. 288; *Nickleson v. Stryker*, 10 Johns. 115, 6 Am. Dec. 318; *Bartley v. Richtmyer*, 4 N. Y. 38; *Mulvehall v. Milward*, 11 id. 343; *Dain v. Wyckoff*, 7 id. 191; *Kennedy v. Shea*, 110 Mass. 147, 14 Am. Rep. 584; *Hewit v. Prime*, 21 Wend. 79; *Greenwood v. Greenwood*, 28 Md. 369; *Boyd v. Byrd*, 8 Blackf. 113, 44 Am. Dec. 740; *Keller v. Donnelly*, 5 Md. 211;

Kendrick v. McCrary, 11 Ga. 603; *Vassel v. Cole*, 10 Mo. 634, 47 Am. Dec. 136; *White v. Murland*, 71 Ill. 250, 22 Am. Rep. 100; *Mohry v. Hoffman*, 86 Pa. 358; *Garretson v. Becker*, 52 Ill. App. 255; *Beaudette v. Gogne*, 87 Me. 534; *Scarlett v. Norwood*, 115 N. C. 284; *Ingwaldson v. Skrivseth*, 7 N. D. 388; *Middleton v. Nichols*, 62 N. J. L. 636.

¹⁸ *Ingerson v. Miller*, 47 Barb. 47.

¹⁹ *Humble v. Shoemaker*, 70 Iowa 223.

²⁰ *Lawyer v. Fritcher*, *supra*.

²¹ *Gray v. Durland*, 50 Barb. 100, 50 N. Y. 424; *Furman v. Van Sise*, 56 id. 435, 15 Am. Rep. 441; *Dedham v. Natick*, 16 Mass. 135; *Blanchard v. Ilsley*, 120 id. 487, 21 Am. Rep. 535; *Matthewson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339; *Keller v. Donnelly*, 5 Md. 211; *Villipique v. Shuler*, 3 Strobb. 462.

There are, however, some adverse decisions.²² In North Carolina the mother may maintain the action in lieu of the father if the latter was living out of the state,²³ and if he is insane she may sue as his next friend, having been appointed such.²⁴ In an Irish case the seduction and pregnancy occurred during the life-time of the woman's father; the confinement, after his death. A recovery was denied the mother because the daughter was not her servant when the seduction took place.²⁵ In some cases in this country the injustice of such a rule has been avoided by making the relation at the time of the confinement the test of liability;²⁶ but there has been dissent from this view.²⁷

If it is alleged that the daughter was the servant of the wife and that the wife was deprived of her services the right of action is in the wife alone; but the husband may be joined as a plaintiff. *Anderson v. Rigg*, 64 N. J. L. 407.

²² *South v. Denniston*, 2 Watts 474; *Bartley v. Richtmyer*, 4 N. Y. 38.

In *Badgley v. Decker*, 44 Barb. 577, it was held that at common law the mother could not maintain an action for the seduction of the daughter while the father was living. But since the recent statutes of that state respecting married women, where a husband has abandoned his wife and family and resides in another state, the wife, owning a house and being engaged in the business of keeping boarders on her sole and separate account may sue alone for the seduction of her daughter, over twenty-one years of age, who resides with and performs service for her about the house.

In *George v. Van Horn*, 9 Barb. 523, it was held that an action cannot be maintained by a mother, after the death of her husband, for seduction of their daughter in his life-time, when the daughter at the

time of the seduction was over twenty-one years of age and was residing with her brother at his residence and had charge of his family. The court also held that the executors and administrators of a deceased father or mother cannot maintain this action for the seduction of their daughter in their lifetime. As well might the action lie, say the court, for criminal conversation with his wife. They cannot represent his aggravated feelings, and the personal disgrace heaped upon him by such events. These causes of action are purely personal, and like assaults, libel and slander die with the person. *Logan v. Murray*, 6 S. & R. 175, 9 Am. Dec. 422. See *Holliday v. Parker*, 23 Hun 71; *Noice v. Brown*, 39 N. J. L. 569; *Coon v. Moffett*, 3 id. 436.

²³ *Abbott v. Hancock*, 123 N. C. 99; *Gould v. Erskine*, 20 Ont. 347.

²⁴ *Abbott v. Hancock*, *supra*.

²⁵ *Hamilton v. Long*, 36 Irish L. T. Rep. 189, [1903] 2 Irish 407.

²⁶ *Coon v. Moffett*, 3 N. J. L. 436; *Parker v. Meek*, 3 Sneed 29.

²⁷ *Bartley v. Richtmyer*, 4 N. Y. 38; *South v. Denniston*, 2 Watts 474.

A father loses the right to his daughter's service when she arrives at age; but if afterwards she still continues to reside with him and is to some extent in his service he may sue for her seduction happening during the time of such service.²⁸ The mere relation of parent and child will not give a right of action for the seduction of an unmarried female; that of master and servant, either actual or constructive, must exist. She must be under his actual or constructive control and dominion. If such a relation exists, it matters not to the cause of action whether the plaintiff be the parent, or merely stands in the relation of parent. An uncle, an aunt, a step-father, a brother, or one having no relationship or affinity to the injured female can sustain the action.²⁹ It is not necessary that the arrange-

²⁸ *Nickleason v. Stryker*, 10 Johns. 115, 6 Am. Dec. 318; *Briggs v. Evans*, 5 Ired. 21; *Miller v. Thompson*, 1 Wend. 447; *Lee v. Hodges*, 13 Gratt. 726; *Sutton v. Huffman*, 32 N. J. L. 58; *Wilhoit v. Hancock*, 5 Bush. 567; *Dain v. Wyckoff*, 7 N. Y. 191; *Patterson v. Thompson*, 24 Ark. 55; *Bayles v. Burgard*, 48 Ill. App. 371; *Beaudette v. Gayne*, 87 Me. 534; *Cumber v. Morley*, 4 Vict. L. R. (law) 3; *Griffiths v. Teetgen*, 15 C. B. 344; *Koenke v. Bauer*, 162 Mo. App. 718; *Palmer v. Baum*, 123 Ill. App. 584, applying the rule to a case of carnal assault.

This rule is not altered by a statute which provides in one section that a father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward is not living with or in the service of the plaintiff at the time of the seduction, or afterward, and there is no loss of service; and in another that a father, or in case of his death, or desertion of his family, the mother, may maintain an

action for the injury of the child, and the guardian for the injury of the ward, notwithstanding the word "child" in the latter section has been interpreted to mean minor child. *Schmit v. Mitchell*, 59 Minn. 251.

In answer to the contention that a father was only entitled to recover nominal damages because the daughter was an adult and away from home, the court said it must consider that the father had lost the comfort of his daughter, and that he is the parent of other children who may be corrupted by her example. As to the woman being away from home, nothing could be said on that head, because she was in an age and in a position where it was proper she should earn her own livelihood. The only effect of a statute dispensing with allegation or proof of loss of service was to leave the rights of the plaintiff as they were before it was enacted. *Clapp v. De La Perrelle*, 17 Vict. L. R. 413.

²⁹ *Anderson v. Aupperle*, 51 Ore. 556, citing the text; *Furman v. Van Sise*, 56 N. Y. 441; *Clark v. Fitch*,

ment by which the relation of master and servant is established should have any permanent binding force between the parties to it. If it exists in fact and the immediate parties are acting under it at the time of the seduction, however imperfect its obligation may be, the defendant, who by his wrongful act has interrupted it, cannot set up that it was liable to be revoked at any time without the assent of the master.³⁰ An imbecile adult daughter is to be regarded as a minor, for the loss of whose services by reason of seduction the father may recover so long as she remains at his home or under his control.³¹

There is a tendency on the part of some courts to overthrow the legal fiction that the action for seduction is based on the loss of service. In Kansas it has been held that the action may be maintained upon the mere relation of parent and daughter alone, the latter being of age and living with her mother. This view is based upon the provisions of the code which abolish the distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing, including the abolishment of feigned issues, and the declaration that the petition must contain a statement of the facts constituting the cause of action.³² In North Carolina an adult woman who has been seduced may sue in her own name to recover therefor by virtue of a provision of the constitution abolishing feigned issues, supplemented by the declaration of the code that an action must be brought by the real party in interest. There the action is for an injury to person or character; it also involves fraud and deceit.³³

2 Wend. 459, 20 Am. Dec. 639; Martin v. Payne, 9 Johns: 387, 6 Am. Dec. 288; Millar v. Thompson, 1 Wend. 447; Davidson v. Goodall, 18 N. H. 423; Ball v. Bruce, 21 Ill. 161; Roberts v. Connelly, 14 Ala. 235; Bartley v. Richtmyer, 4 N. Y. 38; Mulvehall v. Millward, 11 id. 343; Dain v. Wyckoff, 18 id. 45, 72 Am. Dec. 493; Fernsler v. Moyer, 3 W. & S. 416, 39 Am. Dec. 33; Coon v. Moffett, 3 N. J. L. 436; Manwell v. Thomson, 2 C. & P. 303; Edmun-

son v. Machell, 2 T. R. 4; Irwin v. Dearman, 11 East 23; Paterson v. Wilcox, 20 Up. Can. C. P. 385; Magninay v. Saudek, 5 Sneed 146.

³⁰ Lipe v. Eisenlerd, 32 N. Y. 229, 234; Gray v. Durland, 51 id. 124; Riddle v. McGinnis, 22 W. Va. 253.

³¹ Hahn v. Cooper, 84 Wis. 629, citing Lipe v. Eisenlerd, 32 N. Y. 229.

³² Anthony v. Norton, 60 Kan. 341, 44 L.R.A. 757, 72 Am. St. 360.

³³ Hood v. Sudderth, 111 N. C. 215.

§ 1283. Evidence for plaintiff, and damages recoverable.

The rule as to damages is the same whether the daughter be a minor or of full age; the plaintiff is not limited in his recovery to such as are merely compensatory. He may recover exemplary damages when he is so connected with her as to be capable of receiving injury through her dishonor,³⁴ regardless of whether malice existed; the act of seduction is necessarily wilful.³⁵ The wealth of the defendant is a proper subject of inquiry in respect to exemplary damages.³⁶ In estimating the injury the jury may take into consideration, besides the loss of services and the disbursements for medical treatment and other necessary expenses, the wounded feelings and affections of the parent, the wrong done to him in his domestic and social relations, the stain and dishonor brought upon his family, and the grief and affliction suffered in consequence of it, and give damages accordingly.³⁷ If the action is brought by any other than a person standing in the relation of parent it will be governed by the same principles and rules of evidence; and the court and jury will make the proper discrimination as

³⁴ *Luther v. Shaw*, 157 Wis. 234, 52 L.R.A.(N.S.) 85, citing the text; *Russell v. Chambers*, 31 Minn. 54; *Lawyer v. Fritcher*, 130 N. Y. 239, 27 Am. St. 521, 14 L.R.A. 700; *Lipe v. Eisenlerd*, 32 N. Y. 229; *Wilson v. Sproul*, 3 P. & W. 49; *Hornketh v. Barr*, 8 S. & R. 36, 11 Am. Dec. 568; *Kerns v. Hagenbuehle*, 60 N. Y. Super. 228; *Ingwaldson v. Skrivseth*, 7 N. D. 388, 393; *Scarlett v. Norwood*, 115 N. C. 284; *Willeford v. Bailey*, 132 N. C. 402.

³⁵ *Luther v. Shaw*, 157 Wis. 234, 52 L.R.A.(N.S.) 85, citing the text; *Anderson v. Aupperle*, 51 Ore. 556; *Stowers v. Singer*, 24 Ky. L. Rep. 395.

³⁶ *Willeford v. Bailey*, *supra*; *Luther v. Shaw*, 157 Wis. 234, 52 L.R.A.(N.S.) 85.

³⁷ *Russell v. Chambers*, *supra*; *Morgan v. Ross*, 74 Mo. 318; *Riddle*

v. McGinnis, 22 W. Va. 253; *Barbour v. Stephenson*, 32 Fed. 66; *Herring v. Jester*, 2 Houst. 66; *Taylor v. Shelkett*, 66 Ind. 297; *Fox v. Stevens*, 13 Minn. 272; *Paterson v. Wilcox*, 20 Up. Can. C. P. 385; *Wilson v. Sproul*, *Hornketh v. Barr*, *supra*; *Coon v. Moffett*, 3 N. J. L. 436; *Pruitt v. Cox*, 21 Ind. 15; *Phillips v. Hoyle*, 4 Gray 568; *Hatch v. Fuller*, 131 Mass. 574; *Felkner v. Scarlet*, 29 Ind. 154; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Kendrick v. McCrary*, 11 Ga. 603; *Blagge v. Ilsley*, 127 Mass. 198; *Garretson v. Becker*, 52 Ill. App. 255; *French v. Deane*, 19 Colo. 504, 24 L.R.A. 387; *Mighell v. Stone*, 175 Ill. 261; *Middleton v. Nichols*, 62 N. J. L. 636, 640; *Milliken v. Long*, 188 Pa. 411; *Cook v. Bartlett*, 179 Mass. 576; *Palmer v. Baum*, 123 Ill. App. 584, carnal assault.

respects the *quantum* of compensation.³⁸ The person who stands in *loco parentis* to an illegitimate child may recover according to the same standard as a natural parent.³⁹ Damages for wounded feelings, including a sense of personal and family disgrace, are inferred as a natural and necessary consequence of the seduction, and need not be specially alleged.⁴⁰ There cannot be a recovery of damages based on the future condition of the daughter and the offspring of the seduction, or for the former's loss of marriage.⁴¹ In an action by the seduced woman the publicity given to the fact of seduction by the defendant may be proven in aggravation of damages if it has been pleaded,⁴² and in such action the plaintiff may recover for her anguish of mind, and the pain and suffering incident to the birth of a child, the fruit of the seduction.⁴³ Under the California statute the person seduced may recover exemplary damages regardless of whether she was rendered unconscious because of the conduct of the defendant and he committed the act under circumstances which made him guilty of rape, or whether she consciously consented thereto.⁴⁴

As the action is not generally maintainable on the mere relation of parent and child, there must be some proof of loss of service, or other loss resulting from the seduction. Proof of sexual intercourse, or even of seduction, will not sustain the action.⁴⁵ The plaintiff must show that there resulted therefrom some direct injury to his rights as master.⁴⁶ It will be assumed that there is a loss of service if pregnancy follows, or sickness, or the communication of any disease.⁴⁷ So if the sense of

³⁸ *Anderson v. Aupperle*, 51 Ore. 556, quoting the text; *Magninay v. Saudek*, 5 Sneed 146.

The recovery for loss of time is governed by what the plaintiff has earned in her vocation. The physician's fee may be recovered without showing it has been paid. *Lampman v. Brunning*, 120 Iowa 167.

³⁹ *Tittlebaum v. Boehmcke*, 81 N. J. L. 697, 35 L.R.A. (N.S.) 1062.

⁴⁰ *Lunt v. Philbrick*, 59 N. H. 59; *Willeford v. Bailey*, 132 N. C. 402.

⁴¹ *Comer v. Taylor*, 82 Mo. 341.

⁴² *Simons v. Busby*, 119 Ind. 13.

⁴³ *Gemmill v. Brown*, 25 Ind. App. 6.

⁴⁴ *Marshall v. Taylor*, 98 Cal. 55, 35 Am. St. 144.

⁴⁵ *Comer v. Taylor*, 82 Mo. 341; *Kinney v. Laughenour*, 89 N. C. 365; *Delvee v. Boardman*, 20 Iowa 446; *Hill v. Wilson*, 8 Blackf. 123.

⁴⁶ *White v. Nellis*, 31 N. Y. 405, 88 Am. Dec. 282.

⁴⁷ *Anderson v. Ryan*, 8 Ill. 583; *Leucker v. Steileu*, 89 id. 545, 31

shame and wrong-doing diminish the servant's ability to work.⁴⁸ Pregnancy or the birth of a child is not essential. It is sufficient if there be illness of the daughter, resulting from the seduction, and a consequent inability or reduced ability to labor, or if there be expenses necessitated by the same cause.⁴⁹ It is not important to the right of action that the loss should result from the seduction in any particular way. It will be enough if a loss has been occasioned which is a legal, natural and direct consequence of the wrong.⁵⁰ The parent need not, in order to recover damages, including those which are exemplary, show that his daughter's debauchment was accomplished by seductive arts.⁵¹ The age of the daughter and the circumstances under which she was debauched may aggravate or mitigate the damages, but they do not afford any basis for limiting, as matter of law, the father's damages to his actual

Am. Rep. 104; *Hewit v. Prime*, 21 Wend. 79; *Hogan v. Cregan*, 6 Robert. 138; *Mohelsky v. Hartmeister*, 68 Mo. App. 318, 324.

⁴⁸ In *Blagge v. Ilsley*, 127 Mass. 191, Colt, J., said: "There was evidence from several witnesses, including the plaintiff and the daughter, that the latter appeared strong and well before the alleged seduction, and that afterwards she became nervous and excitable, and did not appear to be herself. Upon this part of the case the jury were told that the plaintiff might recover if they were satisfied that, as the immediate result of the criminal act, the health of the daughter failed, and there was a consequent loss of ability to render service; and it must have been found by the jury that the proximate effect of the seduction was an incapacity to work. In the opinion of a majority of the court, it cannot be declared, as matter of law, that this instruction was erroneous, or that the evidence did not justify the finding. The decline in the daughter's health and spirits

directly followed the wrong charged. The daughter was herself a witness, and there was opportunity for the jury to judge of her physical strength and temperament, her natural delicacy and sensibility to the injury alleged. It cannot be laid down as a matter of law that loss of health would not be the natural, probable and direct consequence of the defendant's act, although that act was followed by no sexual disease and no pregnancy. Shame, humiliation and mental distress, affecting the sensibilities of the victim and her capacity for faithful service, may well be a probable and natural consequence of the wrong, wholly without regard to the fear of abandonment or exposure."

⁴⁹ *Id.*; *Night v. Wilcox*, 18 Barb. 212; *White v. Nellis*, 31 id. 279; *Abraham v. Kidney*, 104 Mass. 222, 6 Am. Rep. 620; *Stiles v. Tilford*, 10 Wend. 339.

⁵⁰ *Night v. Wilcox*, 15 Barb. 279.

⁵¹ *Hein v. Holdridge*, 78 Minn. 468. Compare *Palmer v. Baum*, 123

money loss.⁵² Where the illness of the daughter, following seduction, is not the consequence thereof, but of the publication of her shame, it is not a proximate result of the wrong.⁵³

It is competent to show the circumstances under which the female was seduced and the means used for corrupting her mind,—the promises, flattery or deception employed.⁵⁴ An exception has been made of promises of marriage by some courts because the damages for the breach of it belong to the daughter seduced.⁵⁵ When such evidence is admitted the jury should be cautioned to give no damages for breach of such promise.⁵⁶ It may be proved in what manner and on what terms the defendant visited her, the family and her relations.⁵⁷ Evidence in a father's action of a promise of marriage is not admissible as a ground of damage,⁵⁸ nor can he recover compensation for the support and maintenance of the illegitimate

Ill. App. 584, a case of carnal assault.

⁵² *Id.*, citing *Fox v. Stevens*, 13 Minn. 252; *Russell v. Chambers*, 31 Minn. 54; *Stoudt v. Shepherd*, 73 Mich. 558; *McAuley v. Birkhead*, 13 Ired. 28, 55 Am. Dec. 427; *Kennedy v. Shea*, 110 Mass. 147, 14 Am. Rep. 584; *Barbour v. Stephenson*, 32 Fed. 66; *Lawrence v. Spence*, 99 N. Y. 669; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100.

⁵³ *Night v. Wilcox*, 14 N. Y. 413.

⁵⁴ *Watson v. Watson*, 53 Mich. 163; *Bracey v. Kibbe*, 31 Barb. 273; *Phelin v. Kenderdine* 20 Pa. 354; *White v. Campbell*, 13 Gratt. 573; *Fox v. Stevens*, 13 Minn. 272; *Kahn v. Freytag*, 2 Robert. 678; *Parker v. Monteith*, 7 Ore. 277.

⁵⁵ *Comer v. Taylor*, 82 Mo. 341; *Foster v. Schofield*, 1 Johns. 297; *Clark v. Fitch*, 2 Wend. 459, 20 Am. Dec. 639; *Gillett v. Mead*, 7 Wend. 193; *Brownell v. McEwen*, 5 Denio 367; *Kip v. Berdan*, 20 N. J. L. 239.

In Pennsylvania, if the intercourse is admitted, the seduction

being denied, the father may show, in aggravation of damages, that the defendant, after discovering the woman was pregnant, had agreed to marry her. *Milliken v. Long*, 188 Pa. 411.

⁵⁶ *Phelin v. Kenderdine*, 20 Pa. 354.

⁵⁷ *Herring v. Jester*, 2 Houst. 66; *Parker v. Monteith*, 7 Ore. 277; *Davidson v. Goodall*, 18 N. H. 423; *Brownell v. McEwen*, 5 Denio 367.

If the defendant held out expectations to the plaintiff and induced the reasonable belief that he intended to marry his daughter the insult done in the abuse of his hospitality and the betrayal of his confidence may be considered in awarding compensation for his injured feelings. *Lunt v. Philbrick*, 59 N. H. 59.

⁵⁸ *Robinson v. Burton*, 5 Harr. 335; *Gillett v. Mead*, 7 Wend. 193; *Odell v. Stephens*, 12 Ind. 384; *Herring v. Jester*, 2 Houst. 66; *Kip v. Berdan*, 20 N. J. L. 239; *Hines v. Sinclair*, 23 Vt. 108.

child.⁵⁹ But where the seduced may sue in her own name she may allege and prove both the promise of marriage and seduction with a view to damages for the double wrong,⁶⁰ and may prove many acts on the part of the defendant though they extend over a considerable period of time, as well as all the consequences of the seduction.⁶¹ In an action by the party seduced exemplary damages may be recovered regardless of the existence or non-existence of malice on the part of the defendant, and regardless of whether such damages are alleged.⁶² In such an action the use of force is an aggravation of the wrong,⁶³ and the jury may regard any indignities offered her during the trial, any false imputations against her character or virtue, in which event they will be considered as wantonly made.⁶⁴ The plaintiff may show his relationship to the seduced and the situation of the family,⁶⁵ and that the defendant aggravated his wrong-doing by producing an abortion.⁶⁶ There cannot be a recovery for an abortion and the attendant indignities unless damages therefor are specially pleaded, particularly if another suit be pending against the defendant.⁶⁷

There is some conflict of decision on the question of proving the character and social standing of the plaintiff; but it is believed that where he sustains such relation to the seduced as to suffer injury to his feelings through her dishonor it is, according to the weight of authority, competent for him to show, to affect damages, the character and social standing of

⁵⁹ *Hitchman v. Whitney*, 9 Hun 512; *Sargent v. —*, 5 Cow. 106; *Haynes v. Sinclair*, 23 Vt. 108.

The rule applies where pregnancy follows a carnal assault. *Palmer v. Baum*, 123 Ill. App. 584.

⁶⁰ §§ 983, 984; *Lee v. Hefley*, 21 Ind. 98; *Fleetford v. Barnett*, 11 Colo. App. 77.

⁶¹ *McCoy v. Trucks*, 121 Ind. 292; *Shewalter v. Bergman*, 124 Ind. 155; *Russell v. Chambers*, 31 Minn. 54; *Badder v. Keefer*, 91 Mich. 611; *Baird v. Boehner*, 77 Iowa 622; *Breiner v. Nugent*, 136 Iowa 322.

⁶² *Verwers v. Carpenter*, 166 Iowa 273.

⁶³ *Marshall v. Taylor*, *supra*.

⁶⁴ *Ferguson v. Moore*, 98 Tenn. 342.

⁶⁵ *Wilson v. Sproul*, 3 P. & W. 49.

⁶⁶ *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Klopper v. Bromme*, 26 Wis. 372; *Gunder v. Tibbits*, 153 Ind. 591, 600; *Nolan v. Glynn*, 163 Iowa 146, citing the text.

⁶⁷ *Ferguson v. Moore*, *supra*.

his own family and the defendant's pecuniary circumstances.⁶⁸ It is held in Indiana that in an action by the seduced female the defendant's financial standing may be shown; ⁶⁹ but in Iowa neither the plaintiff's financial circumstances nor that of her family is a proper subject of proof if the defendant did not avail himself of it to effect the seduction.⁷⁰ The measure of damages in this action is peculiarly within the province of the jury.⁷¹ It was long ago remarked by Wilmot, C. J., that "actions of this sort are brought for example's sake, and although plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages."⁷² "It is believed," said Sherwood, C. J., "that no case can be found in the books where the verdict in an action such as this has been set aside upon the sole ground of awarding excessive damages."⁷³ There is especial reason why verdicts will not be interfered with where the seduced is the plaintiff.⁷⁴

Debauchment with seduction is one injury, and debauchment without it is another. The rule for the admeasurement of the damages in the one case differs from that in the other. In the former, exemplary damages are allowable; but if sexual intercourse takes place without seduction—without the aid of flattery and artifice—no recovery can be had by the father beyond the loss of services and incidental expenses, unless the debauchment is accomplished with force and violence, or under circum-

⁶⁸ *McAuley v. Birkhead*, 13 Ired. 28, 55 Am. Dec. 427; *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88; *Peters v. Lake*, 66 Ill. 206; *Herring v. Jester*, 2 Houst. 66; *White v. Murtland*, *supra*; *Clem v. Holmes*, 33 Gratt. 722, 36 Am. Rep. 793; *Parker v. Monteith*, 7 Ore. 277; *Applegate v. Ruble*, 2 A. K. Marsh. 128; *Lavery v. Crooke*, 52 Wis. 612, 38 Am. Rep. 768; *Riddle v. McGinnis*, 22 W. Va. 253. *Contra*, *Hodsoll v. Taylor*, L. R. 9 Q. B. 79; *Dain v. Wyckoff*, 7 N. Y. 191; *Watson v. Watson*, 53 Mich. 168. See *Haynes v. Sinclair*, 23 Vt. 108.

⁶⁹ *Shewalter v. Bergman*, *supra*; *Wilson v. Shepler*, 86 Ind. 275; *Gemmell v. Brown*, 25 Ind. App. 6.

⁷⁰ *West v. Druff*, 55 Iowa 335.

⁷¹ *Riddle v. McGinnis*, 22 W. Va. 253, 280.

⁷² *Tullidge v. Wade*, 3 Wils. 18; *Kerns v. Hagenbuehle*, 60 N. Y. Super. 228.

⁷³ *Luther v. Shaw*, 157 Wis. 234, 52 L.R.A.(N.S.) 85, citing the text; *Morgan v. Ross*, 74 Mo. 318; *Marshall v. Taylor*, 98 Cal. 55, 35 Am. St. 144; *Mighell v. Stone*, 74 Ill. App. 129; *Gunder v. Tibbits*, *Baird v. Boehmer*, *supra*.

⁷⁴ *Marshall v. Taylor*, *supra*.

stances constituting the crime of rape. In that event exemplary damages may be recovered,⁷⁵ and the compensatory damages are measured by the same standard as in other cases.⁷⁶

In an action by a wife to recover damages for the seduction of her husband evidence is admissible to prove the affectionate feeling entertained by him for her before the defendant intervened, and to show a subsequent change of feeling; and for the same purpose, and to show the mental suffering of the plaintiff, proof may be made of manifestations of remorse by him in interviews with her, and of grief by her after the intimacy between him and the defendant began.⁷⁷

§ 1284. Evidence for defendant in mitigation. The bad moral character of the plaintiff and his character for chastity, it is held in New York, cannot be proved in reduction of damages. Comstock, J., speaking for the court, said: "It is true that in actions of this kind compensation is given for injured sensibilities of the parent, and that a pecuniary value is placed upon the society and attentions of a virtuous daughter. But to justify evidence of bad reputation in general, or in a particular respect, it must first be shown that the sensibilities of such a parent are less acute, and that the society and affections of a virtuous daughter are to him less valuable than to other men. This cannot be affirmed in fact, and there is no such presumption in law."⁷⁸ The defendant will not be permitted to show that the plaintiff is devoid of natural sensibilities.⁷⁹ In Delaware the defendant may show the plaintiff's dissolute habits, though not his general reputation in respect to virtue;⁸⁰ and in Tennessee it may be shown by general reputation that the plaintiff is a person of profligate principles and dissolute habits, but evidence of particular acts should not be received.⁸¹ It is no defense to the parent's action that the daughter consented willingly to the seduction, for her consent

⁷⁵ Mohelsky v. Hartmeister, 68 Mo. App. 318; De Haven v. Helvie, 126 Ind. 82.

⁷⁶ Koenke v. Bauer, 162 Mo. App. 718.

⁷⁷ Ash v. Prunier, 44 C. C. A. 675, 105 Fed. 722.

⁷⁸ Dain v. Wyckoff, 18 N. Y. 47.

⁷⁹ Grider v. Dent, 22 Mo. 490.

⁸⁰ Robinson v. Burton, 5 Harr.

335.

⁸¹ Reed v. Williams, 5 Sneed 580;

Thompson v. Clendening, 1 Head 287.

will not deprive him of his action; ⁸² neither is the defendant's responsibility lessened because he accomplished his purpose by force.⁸³ In an action by the woman for breach of promise and seduction her criminal misconduct, known to the defendant before he made the promise to marry and participated in by him, cannot lessen his liability.⁸⁴

It is presumed, in the absence of evidence to the contrary, that the person seduced was virtuous at the time of the seduction, and was a comfort and help to her parents if she lived at home.⁸⁵ But her general character is in issue on the question of damages. It may be impeached by general evidence,⁸⁶ and specific acts of lewdness and immorality may in some states be shown ⁸⁷ if the seduced is the plaintiff.⁸⁸ Not only may want of previous chastity be proved by general reputation and specific acts of unchastity, but it may be proved by evidence which tends to show impure conversation and improper and familiar association with men.⁸⁹ In some states the evidence to impeach character for chastity must be confined to general reputation.⁹⁰ Previous chastity is not essential to the cause of action, but antecedent misconduct may have much influence on the question of damages for the parent's shame and disgrace,⁹¹ or for that

⁸² *Bartlett v. Kochel*, 88 Ind. 425; *Barbour v. Stephenson*, 32 Fed. 66; *McAuley v. Birkhead*, 13 Ired. 28, 55 Am. Dec. 427.

⁸³ *Dalman v. Koning*, 54 Mich. 320; *Bradshaw v. Jones*, 103 Tenn. 331.

⁸⁴ *Fleetford v. Barnett*, 11 Colo. App. 77.

⁸⁵ *People v. Brewer*, 27 Mich. 137; *Gemmill v. Brown*, 25 Ind. App. 6; *Robinson v. Powers*, 129 Ind. 480.

⁸⁶ *Reed v. Williams*, *Robinson v. Burton*, *supra*; *Smith v. Milburn*, 17 Iowa 30; *Lea v. Henderson*, 1 Cold. 146; *Bamfield v. Massey*, 1 Camp. 461; *Dodd v. Norris*, 3 id. 519; *West v. Druff*, 55 Iowa 335; *Dalman v. Koning*, *supra*; *Parker v. Coture*, 63 Vt. 155, 25 Am. St.

750. See *Wallace v. Clark*, 2 Overt. 93, 5 Am. Dec. 654.

⁸⁷ *White v. Murland*, 71 Ill. 250, 22 Am. Rep. 100; *Love v. Masoner*, 6 Baxter 24, 32 Am. Rep. 522; *Verry v. Watkins*, 7 C. & P. 308; *Hogan v. Cregan*, 6 Robert. 138; *Kahn v. Freytag*, 2 id. 678. See *Ford v. Jones*, 62 Barb. 484.

⁸⁸ *Gemmill v. Brown*, *supra*.

⁸⁹ *West v. Druff*, *supra*; *Stewart v. Smith*, 92 Wis. 76.

⁹⁰ *Shattuck v. Myers*, 13 Ind. 46; *Hoffman v. Kermerer*, 44 Pa. 452; *Smith v. Yaryan*, 69 Ind. 445, 35 Am. Rep. 232; *Doyle v. Jessup*, 29 Ill. 460.

⁹¹ *Hill v. Wilson*, 8 Blackf. 123; *Comer v. Taylor*, 82 Mo. 341; *Simpson v. Grayson*, 54 Ark. 404, 26 Am.

of the person seduced when she is the plaintiff.⁹² "Proof of former unchastity may be considered in mitigation of damages, and to show that the sexual intercourse was without enticement, artifice, persuasion or solicitation, but is not of itself a defense if the plaintiff had, for a reasonable time before the alleged seduction, been leading a virtuous life."⁹³ Where the person seduced brings the action she may not recover for loss of character, or for shame or disgrace if no evidence of her previous character is given.⁹⁴

The consent or connivance of the parent or one suing in the character of master to the seduction will be a bar to the action. And conduct, not amounting thereto, but only to negligence or want of ordinary prudence, may be shown as tending to mitigate damages.⁹⁵ In such action it has been ruled that a marriage between the seducer and the seduced and his acquittal on an indictment for the seduction may be proved for the same pur-

St. 52; *Smith v. Milburn*, 17 Iowa 30; *Milliken v. Long*, 188 Pa. 411. See *Lea v. Henderson*, 1 Cold. 146, holding that the fact that another person had had intercourse with the person seduced before her alleged seduction by the defendant, this being unknown to him or to the public at the time of the seduction, is not to be considered in mitigation.

The unchaste conduct of the female is provable in mitigation under a general denial without being otherwise pleaded. *Wandell v. Edwards*, 25 Hun 498.

One who injures the reputation of another cannot reap a benefit from his wrong; hence the defendant cannot show that after the seduction the plaintiff's character was bad. *Shewalter v. Bergman*, 123 Ind. 155; *Ayer v. Colgrove*, 81 Hun 322. Nor that the female was guilty of specific unchaste acts. *McKern v. Calvert*, 59 Mo. 243; *Morgan v. Ross*, 74 id. 318.

⁹² *Olson v. Rice*, 140 Iowa 630.

⁹³ *Stowers v. Singer*, 24 Ky. L. Rep. 395, and cases cited; *Patterson v. Hayden*, 17 Ore. 238.

⁹⁴ *Wilson v. Mangold*, 154 Iowa 352.

⁹⁵ *Travis v. Barger*, 24 Barb. 614; *Richards v. Fouts*, 11 Ired. 466; *Graham v. Smith*, 1 Edm. Sel. Cas. 267; *Sherwood v. Tetman*, 55 Pa. 77; *Parker v. Elliott*, 6 Munf. 587; *Smith v. Masten*, 15 Wend. 270.

In an action for the seduction of the plaintiff's daughter the fact of the seduction of another of his daughters three years previously by other than the defendant, and the circumstances connected therewith, is not admissible in mitigation as tending to show that plaintiff was chargeable with careless indifference in affording opportunities for criminal intercourse between the defendant and the daughter whose seduction he is alleged to have accomplished. *Tourgee v. Rose*, 19 R. I. 432.

pose.⁹⁶ In Illinois and elsewhere it has been held that an offer of marriage made by the defendant after the seduction cannot be considered in mitigation.⁹⁷ Evidence of the defendant's general reputation for chastity and purity of life is not admissible.⁹⁸ If money furnished by the defendant to the plaintiff's daughter is not shown to have been applied to plaintiff's benefit or in reduction of his damages such payments cannot be proved.⁹⁹ That the female seduced has in a previous action for breach of promise of marriage recovered punitive damages cannot be considered in mitigation or bar of the action.¹

§ 1285. Criminal conversation and alienation of affections.

The husband's injury by the wrong of criminal conversation consists in his mental suffering from the dishonor of the marriage bed, and the loss of the affections of his wife and the comfort of her society, as well as the pecuniary injury from loss of her services. The loss of "services" in this connection does not ordinarily involve a loss measurable by pecuniary standards; the term implies, rather, whatever of aid, assistance, comfort and society the wife would be expected to render or bestow upon her husband under the circumstances in which they lived.² It is immaterial that the wife is entitled to her own earnings,³ or that she owned property if it was not used or there was not a reasonable expectation that it would be used for the benefit of the husband.⁴ The extent of the actual injury

⁹⁶ Eichar v. Kistler, 14 Pa. 282, 53 Am. Dec. 551.

⁹⁷ White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Ingersoll v. Jones, 5 Barb. 661.

⁹⁸ Watson v. Watson, 53 Mich. 168.

The Minnesota court admits that the generally accepted rule is that evidence of the general character of parties to civil actions, where character is not a part of the issue, is inadmissible. But, on the ground of *stare decisis*, held that evidence of the general reputation for chastity of the defendant in an action
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for seduction is admissible. Hein v. Holdridge, 78 Minn. 468.

⁹⁹ Russell v. Chambers, 31 Minn. 54; Sellars v. Kinder, 1 Head 133; Pruitt v. Cox, 21 Ind. 15.

¹ Luther v. Shaw, 157 Wis. 234, 52 L.R.A. (N.S.) 85.

² Long v. Booe, 106 Ala. 570; Yundt v. Hartrunft, 41 Ill. 9 (injury to family reputation).

³ Id.; Cross v. Grant, 62 N. H. 675, 13 Am. St. 607; Stark v. Johnson, 43 Colo. 243, 127 Am. St. 114; Shannon v. Swanson, 208 Ill. 52; Jenness v. Simpson, 84 Vt. 127.

⁴ Jenness v. Simpson, *supra*.

will, of course, depend on their prior relations and the practical consequences between them of her defection. In this class of cases an actual marriage must be proved,⁵ and the *gravamen* of the action is that the defendant has committed adultery with the wife.⁶ The right of action is not affected if the wrong was committed by force,⁷ nor by the fact that the plaintiff obtained a divorce from his wife a short time before suit was brought,⁸ or condoned her wrong,⁹ or had not lived with her for a considerable time.¹⁰ The amount of damages is left to the discretion of the jury, and the same considerations prevail in their assessment as when they are awarded in favor of a plaintiff who can feel the dishonor of other seductions;¹¹ courts will seldom set aside verdicts for excess,¹² or because they award insufficient

⁵ *Hutchins v. Kimmel*, 31 Mich. 126, 18 Am. Rep. 164; *Browning v. Jones*, 52 Ill. App. 597; *Stark v. Johnson*, *supra*; *Frederick v. Morse*, 88 Vt. 126; *Jowett v. Wallace*, 112 Me. 389; *Vollmer v. Stregge*, 27 N. D. 579.

⁶ *Wood v. Mathews*, 47 Iowa 409; *Prettyman v. Williamson*, 1 Pennew. (Del.) 224; *Evans v. O'Connor*, 174 Mass. 287; *Jowett v. Wallace*, 112 Me. 389.

⁷ *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260.

⁸ *Wales v. Miner*, 89 Ind. 118; *Woldson v. Larson*, 90 C. O. A. 422, 164 Fed. 548.

⁹ *Macdonald v. Macdonald*, 12 *Rettie* (Scotch) 1327; *Verholf v. Van Houwenlengen*, 21 Iowa 429; *Sikes v. Tippins*, 85 Ga. 231; *Stumm v. Hummell*, 39 Iowa 483; *Smith v. Meyers*, 52 Neb. 70; *Shannon v. Swanson*, *supra*.

¹⁰ *Bailey v. King*, 27 Ont. App. 703; *Winter v. Henn*, 4 C. & P. 494; *Evans v. Evans*, [1899] Prob. 195.

¹¹ A verdict in favor of the plaintiff, though it is silent as to compensatory, if it awards exemplary,

damages may be corrected by the court so as to carry nominal damages. *Mills v. Taylor*, 85 Mo. App. 111.

¹² *Johnson v. Allen*, 100 N. C. 131; *Wales v. Miner*, 89 Ind. 118; *Sikes v. Tippins*, *supra*; *Torre v. Summers*, 2 Nott & McC. 367; *Johnston v. Disbrow*, 47 Mich. 59; *Wilford v. Berkeley*, 1 Burr. 609; *Duberly v. Gunning*, 4 T. R. 657; *Long v. Booe*, 106 Ala. 570; *Prettyman v. Williamson*, 1 Pennew. (Del.) 224; *Browning v. Jones*, *supra*; *Puth v. Zimbleman*, 99 Iowa 641; *Dorman v. Seabee*, 21 Ky. L. Rep. 634; *Smith v. Meyers*, *supra*; *Matheis v. Mazet*, 164 Pa. 580; *Speck v. Gray*, 14 Wash. 589; *Scheffler v. Robinson*, 159 Mo. App. 527; *Jowett v. Wallace*, 112 Me. 389.

For cases in which verdicts have been held excessive, see *Hendrick v. Biggar*, 151 App. Div. (N. Y.) 522; *Berney v. Adriance*, 157 App. Div. (N. Y.) 628; *Lupton v. Underwood*, 3 Boyce (Del.) 519 (reducing a verdict in favor of a wife from \$4,000 to \$2,500); *Phillips v. Thomas*, *infra* (setting aside a ver-

damages.¹³ The pecuniary ability of the defendant to respond in punitive damages may be proved,¹⁴ but where such damages are not recoverable the wealth of the defendant is immaterial.¹⁵ Where the trial occurs several years after the cause of action accrued proof of the defendant's bankruptcy at the former trial is not competent.¹⁶ There are also other and peculiar considerations which will enter into the account.¹⁷ Evidence in miti-

dict for \$35,000 after it was reduced to \$25,000).

¹³ Ward v. Thompson, 141 Wis. 376.

¹⁴ Prettyman v. Williamson, Matheis v. Mazet, *supra*; Miller v. Pearce, 86 Vt. 322, 43 L.R.A. (N.S.) 332. *Contra*, unless he used his money as a means of seduction. Cowing v. Cowing, 33 L. J. (N.S.) Prob. 149.

¹⁵ Phillips v. Thomas, 70 Wash. 533, 42 L.R.A. (N.S.) 582; Bailey v. Bailey, 94 Iowa 598.

¹⁶ Peters v. Lake, 66 Ill. 206.

¹⁷ The action lies in this case for the injury done to the husband in alienating his wife's affections, destroying the comfort had from her company, and raising children for him to support and provide for; and as the injury is great, so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case. The rank and quality of the plaintiff; the condition of the defendant, his being a friend, relative or dependent of the plaintiff; or being a man of substance; proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant, and her having always borne a good character till then; and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggrava-

tion. Buller's N. P. 27; Mayne on Dam. (8th Eng. ed.) 584.

The extent of the injury in any case must depend in a great measure upon the previous relations of the parties. If these were cordial and affectionate, and such as are expected to exist when a suitable marriage has been formed, under a proper sense of the obligations and responsibilities that belong to it, the wrong of the seducer who succeeds in withdrawing the wife's affections from her husband, and induces her to live with him a life of shame, it is impossible adequately to measure. If, on the other hand, the husband was a libertine, and has brought shame upon his family by his own notorious misconduct, and if the wife, after the destruction of her affection, by his own abuse and misconduct, has finally surrendered her own honor, it is difficult to understand what claim he can have to legal consideration. And between these extreme cases there may be numerous others differing so widely in their facts, that, while it may be wise to give a right of action in all, yet the measure of redress must be left largely to the discretion of the proper legal tribunal, which shall be at liberty to award much or little according as they find that much or little has been lost by the complaining party. Cooley on Torts, 224.

gation will be received which tends to show that the plaintiff has in fact suffered less injury than would otherwise be a probable inference from the act proved.¹⁸ It is proper to show unhappy relations between him and his wife, or that he was wanting in affection for her,¹⁹ or that there was but slight intercourse between them;²⁰ that he was unkind in his treatment of her, or guilty of infidelities,²¹ or improprieties with other women, especially as bearing upon the extent of his mental suffering,²² or negligently suffered her to encounter temptation,²³ or that

In *Wilton v. Webster*, 7 C. & P. 198, the husband's knowledge of the infidelity of his wife first came to him upon the eve of her death by her confession. He continued to treat her kindly as long as she lived. His right to maintain the action was upheld; but the damages were limited to the shock to his feelings and the loss of the society of the wife during the remainder of her life.

¹⁸ Defendant may show reconciliation as a mitigating circumstance. *Rehling v. Brainard*, — Nev. —, 144 Pac. 167.

¹⁹ *Berney v. Adriance*, 157 App. Div. (N. Y.) 628; *Phillips v. Thomas*, *supra*; *Miller v. Pearce*, 86 Vt. 322; *Lupton v. Underwood*, 3 Boyce (Del.) 519; *Humphrey v. Pope*, 1 Cal. App. 374; *Barnes v. Tibbitts*, 164 Mich. 217; *Lewis v. Roby*, 79 Vt. 487, 118 Am. St. 984; *Ward v. Thompson*, 146 Wis. 376; *Hadley v. Heywood*, 121 Mass. 236; *Coleman v. White*, 43 Ind. 429; *Billings v. Albright*, 66 App. Div. (N. Y.) 239; *Rudd v. Rounds*, 64 Vt. 432; *Bromley v. Wallace*, 4 Esp. 237; *Prettyman v. Williamson*, 1 Pennew. (Del.) 224; *Browning v. Jones*, 52 Ill. App. 597; *Peek v. Traylor*, 17 Ky. L. Rep. 1312.

²⁰ *Calcraft v. Harbrough*, 4 C. & P. 499.

²¹ *Norton v. Warner*, 9 Conn.

172; *Bromley v. Wallace*, 4 Esp. 237; *Browning v. Jones*, 52 Ill. App. 597; *Cross v. Grant*, 62 N. H. 675, 13 Am. St. 607; *Billings v. Albright*, 66 App. Div. (N. Y.) 239.

The English cases are not agreed as to the effect of open adultery on the part of the husband. In *Sturt v. Marquis of Blandford*, *Windham v. Wycombe*, 4 Esp. 17, Lord Kenyon held that it barred the action. In *Bromley v. Wallace*, 4 Esp. 237, Lord Alvanley ruled that it went in mitigation only. Under a statute providing that a witness in any proceeding instituted in consequence of adultery be cross-examined as to any act of adultery unless he or she has already given evidence in the same proceeding in disproof of it, a husband petitioning for the dissolution of his marriage cannot, for the purpose of mitigating damages, be questioned concerning acts of adultery committed during the lifetime of a previous wife. *Babbage v. Babbage*, L. R. 2 P. & D. 222.

²² *Phelps v. Bergers*, 92 Neb. 851.

²³ *Inderlied v. Bullen*, 80 N. J. L. 7; *Calcraft v. Harbrough*, *supra*; *Duberley v. Gunning*, 4 T. R. 657; *Van Vacter v. McKillip*, 7 Blackf. 598; *Bunnell v. Greathead*, 49 Barb. 106; *Pierce v. Pierce*, 3 Pick. 299; *Peek v. Taylor*, 17 Ky. L. Rep. 1312.

the parties were divorced,²⁴ or continued to live and cohabit together.²⁵ The loss to the plaintiff may be greatly mitigated by showing that the wife was of bad character at the time of the alleged wrong. It may be shown that there had been improper familiarities between her and other men,²⁶ that she was wanting or reputed to be wanting in chastity before her marriage,²⁷ or had committed adultery afterwards,²⁸ and before the cause of action accrued; ²⁹ acts of this kind committed thereafter might be the direct result of the defendant's wrong.³⁰ The fact that the defendant was solicited by her will also go in mitigation.³¹ The good faith of the defendant may be shown under a general denial and without special pleading.³² If the guilt of the defendant is admitted the evidence in mitigation may take a wide range; the attitude of the plaintiff toward the marriage relation may be shown and so of his wife's attitude thereto; it bears upon her value to him and upon the liability for punitive damages.³³ The release of the husband from his obligation to clothe, support, cherish and care for his wife goes in mitigation.³⁴ The consent of the plaintiff to the act complained of bars the right of action; ³⁵ but in the absence of connivance by the husband he is not barred of a recovery because he did not prevent the meeting between the parties.³⁶ If there was no seduction, but the fall of the wife was the result of her own licentiousness or she voluntarily gave her affections to the

²⁴ *McNamara v. McAllister*, 150 Iowa 243, 34 L.R.A. (N.S.) 436; *Prettyman v. Williamson*, 1 Pennew. (Del.) 224.

²⁵ *Smith v. Hockenberry*, *infra*. *Contra*, *Frederick v. Morse*, 88 Vt. 126.

²⁶ *Norton v. Warner*, *supra*; *Ward v. Thompson*, 146 Wis. 376.

²⁷ *Conway v. Nicol*, 34 Iowa 533; *Ward v. Thompson*, *supra*; *Smith v. Hockenberry*, *infra*; *Hardy v. Bach*, 173 Ill. App. 123.

²⁸ *Smith v. Hockenberry*, 138 Mich. 129, 146 Mich. 7, 117 Am.

St. 615; *Winter v. Henn*, 4 C. & P. 494.

²⁹ *Smith v. Hockenberry*, 138 Mich. 129.

³⁰ *Elsam v. Faucett*, 2 Esp. 562; *Winter v. Henn*, *supra*.

³¹ *Elsam v. Faucett*, *supra*.

³² *Strock v. Russell*, 148 App. Div. (N. Y.) 483.

³³ *Ward v. Thompson*, *supra*.

³⁴ *Jenness v. Simpson*, 84 Vt. 127.

³⁵ *Frederick v. Morse*, 88 Vt. 126; *Kohlhoss v. Mobley*, 102 Md. 199; *Prettyman v. Williamson*, *supra*.

³⁶ *Woldson v. Larson*, 90 C. C. A. 422, 164 Fed. 548.

defendant the husband has no cause of action for the seduction.³⁷ But her consent to the adultery does not bar the husband's right to recover for the loss of the *consortium* with her which is implied from the adultery.³⁸ It is immaterial in an action by a wife whether the defendant seduced the husband or latter seduced the defendant.³⁹ The husband's recovery is not limited to a nominal sum because his wife had secretly been immoral with other men, and was not seduced by the defendant. "No man has a right to invade the home of another and, if he does, he cannot find excuse in the fact that he is not the only sinner. The only issue in a case of criminal conversation is whether or not the defendant was guilty of adultery with the wife of the plaintiff without the consent of the latter. If guilty, he must respond in substantial damages."⁴⁰

The right of a wife to maintain an action against those who wrongfully and wilfully alienate the affections of her husband from her is not everywhere admitted, and in some states in which it exists it is dependent upon statutes. Where the action may be maintained it can be done by the wife alone⁴¹ without joining her husband; it is not a reason for denying her a remedy that she is living with him,⁴² or is divorced from him.⁴³ The wife need not show the loss of the service of her husband or any other pecuniary loss.⁴⁴ The damages recovered become her property.⁴⁵ The alienation of the affections of the husband is often the means by which his separation from his wife is

³⁷ *Scott v. O'Brien*, 129 Ky. 1, 12, 130 Am. St. 419; *De-Ford v. Johnson*, 152 Mo. App. 209; *Hoggins v. Coad*, 58 Ill. App. 58.

³⁸ *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307.

³⁹ *Miller v. Pearce*, 86 Vt. 322, 43 L.R.A. (N.S.) 332; *Hart v. Knapp*, 76 Conn. 135, 100 Am. St. 989. See *Scott v. O'Brien*, 129 Ky. 1, 130 Am. St. 419, 16 L.R.A. (N.S.) 742, criticising the Connecticut case.

⁴⁰ *Scheffler v. Robinson*, 159 Mo. App. 527.

⁴¹ *Claxton v. Pool*, 182 Mo. App. 13.

⁴² *Foot v. Card*, 58 Conn. 1, 18 Am. St. 258, 6 L.R.A. 829; *Van Olinda v. Hall*, 88 Hun 452; *Gregg v. Gregg*, 37 Ind. App. 210.

⁴³ *Keen v. Keen*, 49 Ore. 362, 10 L.R.A. (N.S.) 504; *Beach v. Brown*, 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. 98; *Postlewaite v. Postlewaite*, 1 Ind. App. 473.

⁴⁴ *Lupton v. Underwood*, 3 Boyce (Del.) 519.

⁴⁵ *Foot v. Card*, *supra*.

effected; that, however, is not essential to her cause of action. The wife is entitled to the aid, support, protection, comfort and society of her husband, and may recover for the loss thereof by the wrongful act of a third party, though the husband may continue to have affection for her.⁴⁶ "A husband makes a *prima facie* case against a stranger when he shows that such stranger voluntarily and unasked, intermeddled with his domestic affairs, and intentionally urged, persuaded and induced his wife to desert and abandon him, and to refuse to live with him; and in the absence of anything in the evidence to justify or excuse such conduct, the plaintiff's right to a recovery, upon proof of such facts, is established."⁴⁷ Proof of adultery is not required.⁴⁸ There may be liability for the partial alienation of the affections of a wife; and even if there was no affection a stranger has no right to interfere and cut off all chance of its springing up.⁴⁹ But damages for debauching a wife cannot be recovered,⁵⁰ or evidence thereof introduced,⁵¹ without tendering the issue of criminal conversation. It is presumed that affection exists.⁵² The damages must be limited to such as are the natural and probable result of the defendant's conduct.⁵³ It is not necessary, in order to confer a right of action, that the

⁴⁶ *Nichols v. Nichols*, 147 Mo. 387, 401; *Noxon v. Remington*, 78 Conn. 296; *Gregg v. Gregg*, 37 Ind. App. 210; *Scott v. O'Brien*, 129 Ky. 1, 16 L.R.A.(N.S.) 742, 130 Am. St. 419 (except, as to support, to the extent the husband may be compelled to furnish it); *Nolin v. Pearson*, 191 Mass. 283, 4 L.R.A.(N.S.) 643, 114 Am. St. 605; *Lupton v. Underwood*, 3 Boyce (Del.) 519.

Testimony as to the value of support is not necessary where the surrounding circumstances and conditions in life of the parties are shown—these enable the jury to form an estimate of the wife's loss. *Stanley v. Stanley*, 32 Wash. 489.

⁴⁷ *Hartpence v. Rogers*, 143 Mo. 623.

⁴⁸ *Ireland v. Ward*, 51 Ore. 102; *Higham v. Vanosdol*, 101 Ind. 160; *Adams v. Main*, 3 Ind. App. 232, 50 Am. St. 266.

⁴⁹ *Dallas v. Sallers*, 17 Ind. 479, 79 Am. Dec. 489; *Fratini v. Caslini*, 66 Vt. 273; *Jenness v. Simpson*, 84 Vt. 127; *Claxton v. Pool*, 182 Mo. App. 13.

"Estrangement is obviously not a bar to the recovery of either compensatory or punitive damages." *Williamson v. Osenton*, 136 C. C. A. 261, 220 Fed. 653.

⁵⁰ *Sweikhart v. Hanrahan*, 184 Mich. 201.

⁵¹ *Perry v. Lovejoy*, 49 Mich. 529.

⁵² *Gregg v. Gregg*, *supra*; *Lupton v. Underwood*, 3 Boyce (Del.) 519.

⁵³ *Lane v. Spence*, 70 Neb. 204.

defendant's conduct be the sole cause of the alienation or separation. It is sufficient if the conduct of the defendant was the controlling cause.⁵⁴

If the action is against the parents or either of them, or a guardian, or brother, of the consort the intent is material in determining liability. A parent has the right to advise his child, and in so doing, in good faith and with a proper motive, is not to be regarded as a mere intermeddler. "A clear case of want of justification on the part of the parents should be shown before they should be held responsible."⁵⁵ The relations of the husband and wife to each other should have a material influence on the amount of damages. If the plaintiff's wife or the wife if she is the plaintiff had reached the crisis "when love begins to sicken and decay" the recovery cannot be as large as if the condition was otherwise.⁵⁶ Evidence as to the state of the plain-

⁵⁴ *Baird v. Carle*, 157 Wis. 565.

⁵⁵ *Gerner v. Gerner*, 185 Pa. 233, 64 Am. St. 646, 44 L.R.A. 549, and cases cited in opinion; *Ickes v. Ickes*, 237 Pa. 582, 44 L.R.A. (N.S.) 1118; *Pooley v. Dutton*, 165 Iowa 745; *Brisson v. McKellop*, 41 Okla. 374; *Hossfeld v. Hossfeld*, 110 C. C. A. 131, 188 Fed. 61; *Gregg v. Gregg*, 37 Ind. App. 210; *Multer v. Knibbs*, 193 Mass. 556, 9 L.R.A. (N.S.) 322; *Cornelius v. Cornelius*, 233 Mo. 1; *Leavell v. Leavell*, 122 Mo. App. 654; *Miller v. Miller*, 122 Mo. App. 693; *Barton v. Barton*, 119 Mo. App. 507; *Trumbull v. Trumbull*, 71 Neb. 186; *Beisel v. Gerlach*, 221 Pa. 232, 18 L.R.A. (N.S.) 516; *White v. White*, 140 Wis. 538, 133 Am. St. 1100; *Jones v. Monson*, 137 Wis. 478, 129 Am. St. 1082. See *Cochran v. Cochran*, 127 App. Div. (N. Y.) 319; *Allen v. Forsythe*, 160 Mo. App. 262.

The burden is on the plaintiff to show bad faith and maliciousness of the defendant in advising the separation. *Baird v. Carle*, 157 Wis. 565; *Pooley v. Dutton*, 165

Iowa 745; *Jones v. Monson*, *supra*.

Bad faith of the defendant in advising separation must be alleged in the complaint. *Baird v. Carle*, *supra*.

The defendant may show facts in justification without pleading justification. *Baird v. Carle*, *supra*.

It is proper to instruct the jury that the presumption is that the defendant acted in good faith and not maliciously in advising a separation. *Baird v. Carle*, *supra*.

⁵⁶ *Williamson v. Osenton*, 136 C. C. A. 261, 220 Fed. 653; *Pooley v. Dutton*, 165 Iowa 745; *Baird v. Carle*, 157 Wis. 565; *Leucht v. Leucht*, 129 Ky. 700, 130 Am. St. 486; *Bathke v. Krassin*, 78 Minn. 272; *Van Olinda v. Hall*, 88 Hun 452; *Rudd v. Rounds*, 64 Vt. 432.

The rule of contributory negligence has no application. If the defendant's efforts were the effectual cause of the separation there may be a recovery although other causes contributed to bring it about. *Nevins v. Nevins*, 68 Kan. 410.

tiff's feeling toward his wife must be limited to the time previous to her association with the defendant.⁵⁷ In estimating the damages sustained by a wife by reason of the alienation of her husband's affections the effect produced upon her by the relations of her husband with defendant are to be considered.⁵⁸ In the absence of the aggravation of criminal conversation the relations which existed between the wife and husband may be proved for the purpose of showing his damage.⁵⁹ This is measured by the value of her services and marital consort, less the value of the performance of the husband's duty to support, clothe and care for her.⁶⁰ The loss of the comfort, society and service of the wife is to be compensated for,⁶¹ and the disgrace and dishonor cast upon the husband are to be considered.⁶² Damages may be allowed as smart money in the discretion of the jury under circumstances which permit their recovery in other tort actions,⁶³ regardless of whether there have been adulterous relations between the defendant and the plaintiff's wife.⁶⁴ It may be shown that the defendant attempted to use the influence of her property to effect the alienation, and to show in connection with that fact the amount of the property.⁶⁵ Under a statute allowing the recovery of punitive damages for a wrong done to the person, one who has intentionally or wil-

⁵⁷ *Fratini v. Caslini*, 66 Vt. 273.

⁵⁸ *Frederick v. Morse*, 88 Vt. 126.

⁵⁹ *Derham v. Derham*, 125 Mich. 109; *Millspaugh v. Potter*, 62 App. Div. (N. Y.) 521; *Bergman v. Solomon*, 143 Ky. 581; *Fuller v. Robinson*, 230 Mo. 22.

The effect of ill treatment by the husband may be shown as bearing on the wife's attitude toward him. *Pooley v. Dutton*, 165 Iowa 745.

⁶⁰ *Rudd v. Rounds*, *supra*.

⁶¹ *Hartpence v. Rogers*, 143 Mo. 623; *Nichols v. Nichols*, 147 Mo. 387; *Wilson v. Coulter*, 29 App. Div. (N. Y.) 85; *Knapp v. Wing*, 72 Vt. 334; *Reading v. Gazzam*, 200 Pa. 70, 106; *Adkins v. Kendrick*, 131 Ky. 779.

⁶² *Linck v. Vorhauer*, 104 Mo. App. 368, citing local cases.

⁶³ *Lupton v. Underwood*, 3 Boyce (Del.) 519; *Williamson v. Osenton*, 136 C. C. A. 261, 220 Fed. 653; *Woldson v. Larson*, 90 C. C. A. 422, 164 Fed. 548; *Gregg v. Gregg*, 37 Ind. App. 210; *White v. White*, 76 Kan. 82; *Nevins v. Nevins*, 68 Kan. 410; *Scott v. O'Brien*, 129 Ky. 1, 16 L.R.A. (N.S.) 742, 130 Am. St. 419; *Leavell v. Leavell*, 114 Mo. App. 24; *White v. White*, 140 Wis. 538, 133 Am. St. 1100; *Hartpence v. Rogers*, *Nichols v. Nichols*, *supra*.

⁶⁴ *Callis v. Merrieweather*, 98 Md. 361, 103 Am. St. 404.

⁶⁵ *Knapp v. Wing*, *supra*.

fully, without justification, alienated the affections of a husband from his wife may be liable for such damages.⁶⁶ The amount of the damages is in the discretion of the jury, which will not be reviewed unless there is reason to believe it has been abused.⁶⁷

Where the action is by the wife for the alienation of the affections of the husband her occupation may be shown, and perhaps her social position as well as his, as bearing upon the value of the latter's *consortium*; but the wealth, rank, social position or condition of the defendant is immaterial,⁶⁸ except to show motive and which party was the enticer.⁶⁹ In Missouri the reputed wealth of the defendant or of one of several defendants may be proved to affect compensatory damages.⁷⁰ In Nebraska the earning capacity and financial condition of the husband bears on the *quantum* of damages.⁷¹ If punitive damages may be recovered the wealth of the defendant may be shown,⁷² but not his reputed wealth.⁷³ The plaintiff wife may prove the cost of her separate maintenance if the evidence tends to show the husband's ability to support her,⁷⁴ and may also show that as the result of the defendant's wrongful acts the entire support of her children has devolved upon her.⁷⁵ The value of property transferred by him is to be regarded.⁷⁶ If the conveyance was made to the defendant without consideration and he has since enjoyed it the facts are material as bearing upon his intent to deprive the plaintiff of all means of support out of the

⁶⁶ *Williams v. Williams*, 20 Colo. 51.

⁶⁷ *Warnock v. Moore*, 91 Kan. 262; *White v. White*, 101 Minn. 451; *Fuller v. Robinson*, 230 Mo. 22; *Hartpence v. Rogers*, *Cochran v. Cochran*, *supra*. See *Silvey v. Silvey*, 96 Miss. 137. In *Allen v. Forsythe*, *supra*, the verdict was reduced one-third. In *Phelps v. Bergers*, 92 Neb. 851, a verdict was set aside because grossly excessive.

⁶⁸ *Bailey v. Bailey*, 94 Iowa 598. The defendant's wealth is immaterial where the action is by the woman's husband. *Flinders v. Bailey*, 133 Iowa 616.

⁶⁹ *Scott v. O'Brien*, *supra*.

⁷⁰ *Leavell v. Leavell*, *supra*.

⁷¹ *Harvey v. Harvey*, *infra*.

⁷² *Taylor v. Wilcox*, 188 Ill. App. 18; *White v. White*, 76 Kan. 82; *Leavell v. Leavell*, *supra*; *Nichols v. Nichols*, 147 Mo. 387.

⁷³ *Derham v. Derham*, 125 Mich. 109.

⁷⁴ *Bowersox v. Bowersox*, 115 Mich. 24.

⁷⁵ *Taylor v. Wilcox*, 188 Ill. App. 18.

⁷⁶ *Williams v. Williams*, 20 Colo. 61.

property of her husband, and as tending to show that the defendant was interested in separating the husband from his wife. It may also be shown that by reason of such conveyance the plaintiff had not recovered anything under a judgment of separation obtained against her husband for alimony or costs.⁷⁷

Mental anguish, mortification and injured feelings must be compensated for;⁷⁸ and if proof has been made of the social standing and character of the parties and the circumstances surrounding the wrong done there is a sufficient basis for awarding damages.⁷⁹ Damages will not be allowed for any injury to the good name and character or the dishonor of the plaintiff's family.⁸⁰ The effects of mental suffering may be proved, as that it resulted in physical suffering, which produced a miscarriage. "This was competent evidence as tending to show the effect of defendant's conduct upon her health, and was proper for the consideration of the jury, in case they found that the miscarriage was the direct result of such conduct, upon the question of damages in connection with the wilful misconduct of the defendants in alienating the husband's affections from his wife and causing him to separate from her."⁸¹ The general allegation of damages covers mental anguish and mortification.⁸²

It may be proven in mitigation that the plaintiff had been guilty of improper relations with a certain man or woman whether the consort had knowledge thereof or not.⁸³ Evidence of the plaintiff's reputation for chastity when married is immaterial if it had nothing to do in bringing about the separation

⁷⁷ *Wilson v. Coulter*, 29 App. Div. (N. Y.) 85.

⁷⁸ *Lupton v. Underwood*, 3 Boyce (Del.) 519; *Taylor v. Wilcox*, 188 Ill. App. 18; *Noxon v. Remington*, 78 Conn. 296; *Adkins v. Kendrick*, 131 Ky. 779; *Scott v. O'Brien*, 129 Ky. 1, 16 L.R.A.(N.S.) 742, 130 Am. St. 419; *Leavell v. Leavell*, *supra*; *Harvey v. Harvey*, 75 Neb. 557; *Hartpence v. Rogers*, 143 Mo. 623.

⁷⁹ *Rice v. Rice*, 104 Mich. 371.

⁸⁰ *Taylor v. Wilcox*, 188 Ill. App. 18.

⁸¹ *Lockwood v. Lockwood*, 67 Minn. 476.

⁸² *Nevins v. Nevins*, 68 Kan. 410.

⁸³ *Angell v. Reynolds*, 26 R. I. 160, 106 Am. St. 707; *Churchill v. Lewis*, 17 Abb. New Cas. 226; *Wolf v. Frank*, 92 Md. 138.

Improper relations of the plaintiff with other women after the cause of action arose may not be shown. *Welker v. Hazen*, 247 Pa. 122.

from her husband.⁸⁴ The bad character of the wife of the plaintiff before marriage cannot be shown unless it is specially pleaded.⁸⁵ The cohabitation of the wife with her husband after knowledge of his illicit act may be considered in mitigation, as may delay in bringing the action.⁸⁶

A person who has persuaded and enticed the wife of the plaintiff to refuse him marital intercourse must respond in compensatory and exemplary damages to the extent the jury may determine in view of all the evidence of his conduct, though that goes to show he committed adultery or alienated her affections from the plaintiff.⁸⁷ Testimony showing the conduct of the defendant after the plaintiff's wife had left him and after the bringing of the action is competent.⁸⁸

⁸⁴ *White v. White*, 76 Kan. 82.

⁸⁷ *Plourd v. Jarvis*, 99 Me. 161.

⁸⁵ *Frank v. Berry*, 128 Iowa 223.

⁸⁸ *Sweikhart v. Hanrahan*, 184

⁸⁶ *Churchill v. Lewis*, *supra*.

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CHAPTER XXXIX.

DAMAGES FOR TORTS IN ADMIRALTY.

- §1286. Fundamental difference between liability in admiralty and at common law; exemplary damages.
1287. Division of loss in collision cases; contribution between joint wrongdoers.
1288. Rule applicable to other torts; in what proceedings recovery may be had by passengers; nominal damages.
1289. Liability confined to proximate loss; certainty of damage.
1290. Total loss; elements of damage.
1291. Total loss, what is.
- 1292, 1293. Partial loss; elements of damage.
1294. Interest.
1295. Mitigation of liability.
1296. Recovery by owner of cargo; who may sue.

§ 1286. Fundamental difference between liability in admiralty and at common law; exemplary damages. At common law a party injured by the act or neglect of another is entitled to recover such a sum as will place him in as good condition as though the wrong had not occurred. If his own conduct contributed to produce the result of which he complains he cannot obtain redress.¹ The civil law is in harmony with the common law on this proposition. The reason for the rule is said to be based upon grounds of public policy, which requires, in the interest of the whole community, that every one shall take such care of himself as can reasonably be expected. There is another and more commonly assigned reason for regarding contributory negligence as a defense instead of as a mitigation of damages—the law has no scales to determine whose wrongdoing was the most potent factor in causing the mischief. In courts of admiralty the rule is different. As between the parties to the wrong complained of, the loss resulting from a collision will be divided in three classes of cases: first, when there is no fault on either side; second, when the fault is inscrutable; and third,

¹ Belden v. Chase, 150 U. S. 674, 691, 37 L. ed. 1218, 1224.

when both parties are in fault.² This rule of apportionment emanated from the ancient maritime codes.

Exemplary damages are not recoverable in a suit *in rem* against a vessel for a maritime tort.³ A claim therefor was disallowed for the forcible detention of possession of a tug by her charterers after a breach of their contract, where that was done under legal advice.⁴ Such damages cannot be enforced against a vessel whose owner had no share in or knowledge of the malicious act because of which they were claimed.⁵

§ 1287. Division of loss in collision cases; contribution between joint wrong-doers. "The rule of admiralty in collision cases, as we understand it," said Justice Bradley, "is that where both vessels are in fault they must bear the damage in equal parts—the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one-half of the difference between the respective losses sustained."⁶ The judge further said: "But when claims are prosecuted judicially, the courts regard the pleadings, and the English courts are very strict in holding the parties to their allegations, and in refusing relief unless it is sought in a direct mode."⁷ If only one party sues, and the other merely defends the suit, and upon the proofs it appears that both parties are in fault, the court declares this fact in the decree, and decrees to the libelant one-half of the damage sustained by him—the damage sustained by the respondent not being regarded as the subject of investigation determinable in that suit.⁸ This technical

² Cohen's Admiralty, 229.

³ The William H. Bailey, 103 Fed. 799.

⁴ The Mascotte, 72 Fed. 684.

⁵ The Seven Brothers, 170 Fed. 126.

⁶ The North Star, 106 U. S. 17, 20, 27 L. ed. 91, 93, citing The Catharine v. Dickinson, 17 How. 170, 15 L. ed. 233 (which case established the rule for the supreme court of the United States), and other cases confirmatory of it; The Conemaugh, 189 U. S. 363, 47 L.

ed. 854; The Chattahoochee, 21 C. C. A. 162, 173 U. S. 540, 43 L. ed. 801, 74 Fed. 899; The Manitoba, 122 U. S. 97, 30 L. ed. 1095; The C. R. Hoyt, 136 Fed. 671.

⁷ See The Itasca, 117 Fed. 885.

⁸ The rule of The Milan, Lush. 388, that where both ships are at fault for a collision the cargo owners on one can recover against the other ship only one-half their damage, applied. The Drumlanrig, [1910] Prob. 249.

result of the form of proceedings and pleadings, in which the respondent suffers himself to be placed in a position of disadvantage, has led to the erroneous notion that each party is entitled by the law to be paid one-half of his damage by the other party, and that each claim is independent of the other. But where both parties file libels, as they are entitled to do, although, to conform to the pleadings, a decree may be rendered in each suit in favor of the libellant for one-half of his damage, even the English courts will not allow two executions, but will grant a monition in favor of that party who has sustained most damage for the balance necessary to make the division of damages equal."⁹ In this country if both parties file libels the suits will be consolidated and the decree will pronounce for one-half of the difference of the damage sustained by the two vessels.¹⁰ Where the injury results from the combined negligence of two or more¹¹ vessels the damages should be apportioned equally

⁹ *The North Star*, *supra*.

The rule declared in *The North Star* is the same as that established in the house of lords a very short time before that case was decided. *Stoomvaart Maatschappij Nederland v. Peninsular & O. S. N. Co.*, L. R. 7 App. Cas. 795 (July, 1882).

¹⁰ *Id.*

¹¹ *The S. A. McCaulley*, 116 Fed. 107, modifying s. c., 110 id. 227.

It is said in *The Eugene F. Moran*, 143 Fed. 187: There are a number of authorities which hold that, in cases where one vessel is towing another, the tug and tow are to be considered as one vessel. *The Niobe*, 13 Prob. D. 556, [1891] App. Cas. 401; *The Englishman and The Australian*, [1894] Prob. 239; *The Anerly*, 58 Fed. 794; *The Komuk*, 120 id. 841. Other authorities hold that in such cases each vessel in each flotilla is a distinct entity, and each vessel at fault equally liable for any damage with the other vessels in fault.

The Brothers, 2 Biss. 104, Fed. Cas. No. 1,969; *The Peshtigo*, 25 Fed. 488; *The Lyndhurst*, 92 id. 681; *The Nettie L. Tice*, 110 id. 461; *The Doris Eckhoff*, 41 id. 156; *The Maling*, 110 id. 227; *The S. A. McCaulley*, 116 id. 107. "In my opinion the rule which holds that each vessel in fault is to share equally with every other vessel in fault is upheld by the greater weight of authority, particularly in this country, and has the advantage of greater simplicity of application."

"Where all the tugs employed to perform a towage service belong to the same owner and injury is sustained by the vessel towed through the negligence of one of such tugs, they are rightly regarded in the same situation as a single vessel."

Rebstock v. Gilchrist T. Co., 132 Fed. 174, and cases cited.

Regardless of the number of vessels at fault the liability is apportioned equally though more than one of them is owned by the same

between them, the right being reserved to the libellant to collect the entire amount from either of them to the extent of her stipulated value in case of the inability of the other to respond for her portion.¹²

The rule of equal liability is sometimes varied, as where there is mutual fault, the fault of one vessel being much greater than that of the other.¹³ In such a case, as between the cargo owner and the vessels, the entire proceeds of the one most at fault would be devoted to making good the loss, and the other vessel will be liable for any deficiency.¹⁴ Where the rule of equal liability governs it cannot be evaded by the purchase at a discount of claims for injuries to cargo by the agents of one of the vessels. In adjusting their liabilities such claims will be allowed at the sum paid, with interest.¹⁵ On a libel for the loss of a vessel and cargo, a division of the damages having been decreed, if one of the parties, pending suit, buys the claims of the cargo owners he can recover from the other only for his proportion of the sum paid, with interest thereon.¹⁶ The fact that one of the vessels at fault cannot be brought before the court because without the jurisdiction does not affect the right of the libeled vessel, which has paid all the damages, to be subrogated to the rights of the original damage claimant and to bring an independent suit against the other to establish her liability also and to enforce contribution.¹⁷ The Harter act¹⁸ has no application in case of a collision by mutual

person. *The Eugene F. Moran*, 212 U. S. 466, 53 L. ed. 600.

There is no liability upon a tow free from fault if she was passively in control of a tug; the two do not constitute one vessel. *The Violletta*, 141 Fed. 690. *The Doris Eckhoff*, 50 id. 134, 1 C. C. A. 494. See *Sturgis v. Boyer*, 24 How. 110, 16 L. ed. 591.

¹² *The Sterling and The Equator*, 106 U. S. 647, 27 L. ed. 98.

¹³ See *Lake Erie T. Co. v. Gilchrist T. Co.*, 142 Fed. 89, 73 C. C. A. 313.

¹⁴ *The Victory*, 15 C. C. A. 490, 68 Fed. 395.

¹⁵ *The Gulf Stream*, 58 Fed. 604, 64 id. 809, 12 C. C. A. 613.

¹⁶ *Id.*

¹⁷ *The Mariska*, 47 C. C. A. 115, 107 Fed. 989.

A vessel owner who has paid the damage done to a cargo by his own vessel and another in fault may recover from the latter by way of contribution. *Erie R. Co. v. Erie & W. T. Co.*, 204 U. S. 220, 51 L. ed. 450.

¹⁸ 27 U. S. Stats. 445.

fault, whereby one vessel and her cargo are totally lost, so as to prevent the operation of the general rule allowing the other vessel, after paying the entire value of the cargo, to recoup one-half of that amount out of the half of the damages awarded to the owners of the lost vessel.¹⁹ The claim for contribution may be enforced in proceedings by the vessel-owner, who has paid in full the damages sustained by cargo-owners or passengers, for the limitation of his liability though the vessel against which the contribution is sought was not a party to the suit in which such liability was determined.²⁰

§ 1288. Rule applicable to other torts; in what proceedings recovery may be had by passengers; nominal damages. If a person injured by a tort which is cognizable in the common-law courts brings his suit to recover therefor in a court of admiralty he elects to be compensated according to the rule there prevailing; and if his fault contributed to the wrong of which he complains he must be content with the recovery of a moiety of the damages resulting from it.²¹ Where seamen are injured by the fault of the vessel on which they are serving and the co-operating fault of another vessel their recovery against the latter cannot exceed one-half their loss; the other half must be borne by themselves, inasmuch as they cannot claim compensation against their employer for an injury resulting from their own neglect.²² The recovery by a seaman for the consequences of the negligence of the master or any member of the crew of the vessel or for an accident is limited to the expense of his maintenance

¹⁹ *The Chattahoochee*, 21 C. C. A. 162, 173 U. S. 540, 43 L. ed. 801, 74 Fed. 899. See *The Viola*, 60 Fed. 296.

²⁰ *In re Eastern D. Co.*, 182 Fed. 179.

²¹ *Atlee v. Northwestern Union P. Co.*, 21 Wall. 389, 22 L. ed. 619; *McCord v. The Tiber*, 6 Biss. 409; *The Queen*, 40 Fed. 694, applying the rule to a case of personal injuries; *The Watson*, 128 Fed. 201; *Boucher v. Clyde S. Co.* (1904), 2 Irish 129.

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²² *The Queen*, 40 Fed. 694; *Jakobsen v. Springer*, 31 C. C. A. 315, 87 Fed. 953; *The Livingstone*, 104 Fed. 918; *Wm. Johnson & Co. v. Johansen*, 30 C. C. A. 675, 86 Fed. 886; *The Eddystone*, 33 Fed. 925; *Olson v. Flavel*, 34 id. 477; *The City of Norwalk*, 55 id. 98; *The Job T. Wilson*, 84 id. 204, 208; *The Transfer No. 4*, 61 id. 336, 9 C. C. A. 520; *In re Lakeland T. Co.*, 103 Fed. 328. *Contra*, *The Prudence*, 212 Fed. 541.

and cure.²³ As to passengers, shippers or consignees the measure of compensation for any wrong or breach of contract is damages to the amount of the whole loss sustained; being innocent of all wrong, they bear no proportion of the loss resulting from a collision,²⁴ in the absence of negligence contributing to the injury.²⁵ Their full damages may be recovered against either vessel in a suit brought therefor or they may be allowed in proceedings for the limitation of liability taken by the owner of either vessel in fault.²⁶ The damages allowed for the loss of life are largely in the discretion of the court, which proceeds upon the same rules as courts of common law.²⁷ In a proceeding *in personam* for the recovery of damages caused by the death of a stranger to the vessel, the rule that contributory negligence has merely the effect to divide the damages does not apply; admiralty will give effect to the statute of the state in which the wrong was done.²⁸ The master of a tug is a common-law bailee of a tow in his charge, and may recover its full value against another vessel which collides with the tow and causes its loss.²⁹ It is otherwise as to the charterer of a vessel for a fixed sum, he paying all her expenses and having full control and management. Her contributory fault is imputed to him.³⁰ While the damages done to a scow being towed by a tug, the owner being an innocent sufferer, are primarily chargeable in equal parts to the tug and the vessel which collided with her, if the owner of the scow is unable to obtain the sum charged

²³ *The Osceola*, 189 U. S. 158, 47 L. ed. 760; *The Charles H. Klinck*, 172 Fed. 1019.

²⁴ *The Atlas*, 93 U. S. 302, 23 L. ed. 885; *The Victory*, 15 C. C. A. 490, 68 Fed. 395; *The Virginia Ehrman and The Agnese*, 97 U. S. 316, 24 L. ed. 893. See § 1296.

²⁵ *The Lackawanna*, 151 Fed. 499.

²⁶ *In re Eastern D. Co.*, 182 Fed. 179.

²⁷ *The Charlotte*, 124 Fed. 989. See § 1259.

²⁸ *Monongahela River C. O. & C. Co.*, 196 Fed. 375.

²⁹ *The Jersey City*, 2 C. C. A. 365, 51 Fed. 527; *The Mercedes*, 108 Fed. 559.

³⁰ *The Livingstone*, 104 Fed. 918, reversed on other questions, 113 id. 879, 51 C. C. A. 560.

But where the owner of the vessel retains possession and control of its navigation the charter party is a mere contract of affreightment and the charterer may recover his full loss from the other vessel at fault. *The Beaver*, 135 C. C. A. 37, 219 Fed. 139.

against either he may compel the other to pay the whole.³¹ The provisions of the Harter act do not affect the operation of the equitable rule which gives priority to the claim of the innocent cargo owners over that of the vessel owner against the fund available for the payment of damages sustained through a collision brought about by mutual fault.³² Nominal damages are not awarded for personal torts in admiralty.³³

§ 1289. **Liability confined to proximate loss; certainty of damage.** The liability in admiralty for the consequences of a collision is not more extended than in the common-law courts in cases of other torts. The wrong-doer must respond for all the direct injury which follows his wrongful act or culpable neglect; but he is not liable for anything beyond the direct consequences.³⁴ Where a boat engaged in transporting ice was so aged as to be too weak to stand the wear and tear it was ruled that for an injury to her, which caused the loss of her cargo, the party in fault was liable only to the extent that damage would have resulted from his act if the boat affected by it had been ordinarily fit for the business in which it was engaged.³⁵ Remote and contingent losses caused by the demoralization of business or otherwise cannot be recovered.³⁶ The catch of fish made by a fishing vessel totally lost, except as to her outfit, and the average catch of fish of other vessels in the same vicinity is not a good basis on which to make an award of profits from her prospective catch during her proposed expedition.³⁷ It may be questioned whether the better rule is not laid down in a later case which favors the view that the proof of damages need not amount to a demonstration. A fish net was damaged, and compensation claimed for the loss of fish therein and for

³¹ The Job T. Wilson, 84 Fed. 204.

³² The George W. Roby, 49 C. C. A. 481, 111 Fed. 601.

³³ In re California N. & I. Co., 110 Fed. 670.

³⁴ Brown v. Pillow, 98 C. C. A. 579, 174 Fed. 967; The J. G. Lindauer, 158 Fed. 449; The Rickmers, 73 C. C. A. 415, 142 Fed. 305; The

Mary S. Lewis, 126 Fed. 848; The John H. May, 53 Fed. 664.

³⁵ Mould v. The New York, 40 Fed. 900. See Gilkey v. The Beta, 44 id. 389; Walaas v. Johnson, 204 Fed. 440.

³⁶ The Glenogle, 122 Fed. 503.

³⁷ The Menominee, 125 Fed. 530. See § 60.

the loss of the probable catch during the time the net was being repaired. The evidence of others who were fishing in the vicinity and the number of fish taken from the net after it was injured afforded a basis for awarding damages for being deprived of the opportunity to make a catch of fish.³⁸ If a collision deprives the master of a ship of his compass, chart and logline, thereby rendering it difficult if not impossible for him to know his exact whereabouts, and he judiciously undertakes to reach a place of safety, and is not chargeable with negligence in his attempt to do so, the wrong-doer is liable for the consequences, as the abandonment of the vessel made necessary by her becoming grounded. Depriving the vessel's officers of the means of averting such an accident is the proximate cause of the resulting loss.³⁹ If personal injuries result from a collision they may be recovered for⁴⁰ and so may the damage resulting from the loss of life.⁴¹ The latter cause of action may be recovered for in a proceeding *in rem* against the vessel responsible for it.⁴² In an English case in which the collision had previously been adjudged to be owing to the mutual fault of two vessels there was added to a moiety of the plaintiffs' claim, payable by the defendants, a moiety of the amount of damages recoverable from the plaintiffs by the owners of a barge against which the plaintiffs' vessel was driven in consequence of the collision. It was contended that, as the parties were joint tort-feasors, no contribution could be claimed from the defendants in respect of the damage to the barge paid by the plaintiffs. This contention was overruled, and it was held that liability for such consequential damage existed, notwithstanding it arose out of a tort.⁴³ The expense incurred in replacing papers lost by a libellant in a collision is too remote to be an element of damage.⁴⁴ A libellant may recover the reasonable

³⁸ *The Seven Brothers*, 170 Fed. 126.

³⁹ *The City of Lincoln*, 15 Prob. Div. 15.

⁴⁰ *The George and Richard*, L. R. 3 Adm. 466.

⁴¹ *Id.*; *The Sea Gull*, Chase's Dec. 145.

⁴² *The Sea Gull*, Chase's Dec. 145.

⁴³ *The Frankland*, [1901] Prob. 161.

⁴⁴ *Jacobsen v. Dalles, P. & A. N. Co.*, 93 Fed. 975.

premiums paid a surety company for securing the payment of his costs or the release of a libeled vessel free from fault.⁴⁵ The salvage award in favor of a rescuing tug may be recovered, as may the costs paid therein and the value of property damaged.⁴⁶

Under the maritime law a seaman who is injured or becomes ill while in the service of his ship is entitled to medical care, nursing and attendance, and to a cure, so far as a cure is possible, at the expense of the ship. The duty devolves upon the master to take all reasonable measures to that end; for his neglect in that behalf her owners are responsible. If neglect results in increasing the pain of the injured seaman and renders a temporary injury permanent he may recover therefor, though but for such neglect the liability of the owners would be limited as stated.⁴⁷ Damages for loss of earnings and expenses after discharge from service are recoverable from a shipowner who has failed to furnish proper medical attention and care to an injured seaman.⁴⁸

§ 1290. **Total loss; elements of damage.** If a vessel is completely lost the libellant is entitled to have restored to him such a one as he has been deprived of. While the measure of damages for loss of a vessel is, in the first instance, the market value,⁴⁹ in the absence of a market for such type of vessel the damages are to be ascertained by deducting the amount of depreciation from the original cost.⁵⁰ It was said where there was a loss of a French fishing brig of the kind French fishermen are willing to use for their business, and such as are constantly built in France for that purpose, that the fact that

⁴⁵ *The Volund*, 104 C. C. A. 373, 181 Fed. 643; *The Europe*, 175 Fed. 596; *The John D. Dailey*, 158 id. 642.

⁴⁶ *The Charles G. Lister*, 174 Fed. 288.

⁴⁷ *Croucher v. Oakman*, 3 Allen 185; *The M. E. Luckenbach*, 174 Fed. 265; *The Fullerton*, 92 C. C. A. 463, 167 Fed. 1; *The Troop*, 63 C. C. A. 584, 128 Fed. 856; *The Matterhorn*, 63 C. C. A. 331, 128

Fed. 863; *Wittekoppe v. New York & P. S. S. Co.*, 189 Fed. 920; *Whitney v. Olsen*, 47 C. C. A. 331, 108 Fed. 292.

⁴⁸ *North Alaska Salmon Co. v. Larsen*, 135 C. C. A. 661, 220 Fed. 93.

⁴⁹ *Alaska S. S. Co. v. Inland Nav. Co.*, 128 C. C. A. 366, 211 Fed. 840.

⁵⁰ *The Samson*, 133 C. C. A. 260, 217 Fed. 344.

vessels of the same tonnage, which English and American fishermen consider superior to the French vessels, could be built or purchased for a considerably less sum in England or the United States was immaterial, in view of the fact that there was a regular market price in France for vessels like the one lost.⁵¹ Where there was a total loss of an expensive pleasure yacht, for which there was no established market value, the court said that her original cost, her condition at the time of the loss and the sum for which the plaintiff could have got such another yacht built, were important matters in the calculation. Another inquiry of practical value would be, what amount any person of sufficient means, desiring to acquire a yacht of her size and character, might reasonably be expected to be willing to pay for the same rather than incur the cost of a new structure, considering, nevertheless, the inducements to secure the new by reason of the probable improvements and the other advantages which the new offers.⁵² The test of the value of a vessel, in the absence of a market value, is what she was fairly worth to her owners from a business point of view.⁵³

It has been held that the value of the property lost at the time of its destruction affords full indemnity to the owners of it,⁵⁴ and that there cannot be a recovery for lost freights or the contingent profits which the master of a vessel might realize from the allowances made to him upon the voyage.⁵⁵ All the adjudications have not held to this great strictness. Where a smack was negligently run down while performing salvage service her value was recovered and also damages for the loss of the anticipated salvage reward.⁵⁶ In a later English case than is referred to in note fifty-five the principle is said to be well established to allow the gross freight, less the expense which would have been incurred in earning it.⁵⁷ Where the vessel lost was without cargo, but was under charter, the profits

⁵¹ *Guibert v. British Ship George Bell*, 3 Fed. 581. See *The Colorado*, Brown 411.

⁵² *The H. F. Dimock*, 23 C. C. A. 123, 77 Fed. 226. See *La Normandie*, 7 C. C. A. 285, 58 Fed. 427.

⁵³ *The Harmonides*, [1903] Prob. 1.

⁵⁴ *The Mobila*, 147 Fed. 882.

⁵⁵ *The Columbus*, 3 W. Rob. 164 (1849).

⁵⁶ *The Betsey Carnes*, 2 Hagg. 28.

⁵⁷ *The Canada*, Lush. 584 (1860).

under the charter-party, rather than interest on her value at the end of the journey, more accurately represented the loss to the owner, and was considered to be the equivalent of freight when a cargo is on board.⁵⁸ Where a vessel was lost while proceeding from her home port with a cargo to a foreign port, thence to go to another port and return home under a charter therefrom, her value was fixed as of the time she would have reached home, including the profits which would have been derived under all the charters, less a reasonable allowance on a percentage basis for contingencies.⁵⁹

In this country the admiralty courts do not recognize any distinction between cases of partial and total loss in determining the damages which may be recovered for a collision. In both classes of cases they allow as part of the damages the net freight which the vessel was in process of earning at the time of her loss.⁶⁰ The rule has been applied, though it has recently been dissented from,⁶¹ where a vessel was chartered for a fixed time and was wholly lost while engaged in the performance of the contract.⁶² In the case last cited compensation was allowed for the loss of a verbal charter for the season which embraced many trips subsequent to the one on which the collision occurred. Judge Lowell stated that his ruling was "an advance upon the decisions," and Judge Brown has observed of it that "no other similar case in this country or in England is found."⁶³ The rule which permits the recovery of the net value of an existing charter rests upon the ground that the loss of the vessel is necessarily followed by a loss of the profits it would have made, because the charterer could not be obliged to accept performance of his contract by the employment of any other than the

⁵⁸ *The Kate*, [1899] 1 Prob. 165, 174.

⁵⁹ *The Racine*, [1906] Prob. Div. 273, following *The Kate*, *supra*.

⁶⁰ *The Rebecca*, 1 Blatch. & H. 356; *The Baltimore*, 8 Wall. 386, 19 L. ed. 465; *The Hope*, 5 Fed. 822; *The Minnie*, 26 id. 860.

⁶¹ *The George W. Roby*, 49 C. C. A. 481, 111 Fed. 601; *The Fontana*,

56 C. C. A. 365, 119 Fed. 853. In the last case there was a recovery of interest on the value of the vessel and her pending freight.

⁶² *The Hope*, 5 Fed. 822; *The Freddie L. Porter*, 8 id. 170. Compare *The Amiable Nancy*, 3 Wheat. 546, 4 L. ed. 456.

⁶³ *The City of Alexandria*, 40 Fed. 697.

stipulated vessel. Hence the rule stated does not apply where the contract provides for the accomplishment of results and leaves the contractor at liberty to use any instrumentalities he sees fit.⁶⁴

There has arisen some difference of opinion as to the right to recover net freight which would have been earned by the lost vessel under a charter-party which she had not entered upon.⁶⁵ But that question has been put at rest by the supreme court of the United States. Brown, J., said for the court: The probable net profits of a charter may be considered in cases of delay, occasioned by a partial loss, where the question is as to the value of the use of the vessel pending her repairs. * * * But in cases of total loss the probable profits of a charter not yet entered upon are always rejected.⁶⁶ * * * In cases of a partial loss there is no injustice in allowing the probable profits of a charter for the short time during which the vessel is laid up for repairs; but in cases of a total loss the recovery of such profits is limited to the voyage which the vessel is then performing, since, if the owner were entitled to recover the profits of a future voyage or charter, there would seem to be no limit to such right so far as respects the time of its continuance, and if the vessel were under a charter which had months or years to run the allowance of the probable profits of such charter might work a great practical injustice to the owner of the vessel causing the injury.⁶⁷

There cannot be a recovery for lost freight when the vessel is wholly laden with her owner's goods at the time of the collision because of the rule which confines the recovery of the

⁶⁴ *Id.*; *The North Star*, 44 Fed. 492. In the last case a steamer was sunk after she had entered upon the performance of her charter. Her owner was paid a considerable sum for a re-assignment and release of his interest in the charter on the theory that he had the right to substitute another vessel. On that consideration it was held that he could not recover the profits which would have accrued to him from a

complete performance of the charter.

⁶⁵ *The Iberia*, 46 Fed. 301.

⁶⁶ Citing *The Amiable Nancy*, 3 Wheat. 546.

⁶⁷ *The Umbria*, 166 U. S. 404, 421, 41 L. ed. 1053, 1062; *Fabre v. Cunard S. Co.*, 3 C. C. A. 534, 53 Fed. 238; *The Hamilton*, 95 Fed. 844; *In re Lakeland T. Co.*, 103 *id.* 323.

shipper to the value of the cargo at the place of shipment. Brown, J., said: "The compensation for which the shipowners look in the employment of their vessel to carry their own goods is solely in the expectation of the enhanced value of the goods at the place of discharge; and if that expectation of enhanced value cannot be considered in determining the owner's loss on the goods, I do not see how it can be any more considered as regards the loss of the ship, either directly or indirectly. Nor is that necessary; nor is the supposition of a fictitious charter necessary in order to satisfy the rule of *restitutio in integrum*. That rule will be fully satisfied by allowing to the libelants, as in the case of goods wholly lost at sea, the market value of their vessel at the port of sailing at the time she was devoted to the voyage, with interest from that date; and, in addition thereto, whatever stores or special equipment of any kind may have been provided for the voyage, including the wages of officers and men from the time they were engaged, as well as any other items of expense, if any, reasonably incurred for the prosecution of the voyage up to the time of loss, with interest on such sums from the time they were supplied or paid."⁶⁸ The evidence concerning unearned freight must be so clear that the court can estimate its value with reasonable certainty.⁶⁹

In proving the value of a vessel it may be shown, as an element thereof, that she would have been able to earn a bounty under the law of her nationality; but, there cannot be a recovery for the loss of the bounty.⁷⁰ To the full value at the time she sunk there may be added the cost of raising her if that is necessary in order to ascertain whether she should be abandoned as a total loss or repaired;⁷¹ and if it is necessary to remove her because she is a menace to navigation the expense of so doing may be recovered.⁷²

⁶⁸ *The Beatrice Havener*, 50 Fed. 232.

⁶⁹ *Pennell v. United States*, 162 Fed. 75.

⁷⁰ *Fabre v. Cunard S. Co.*, *supra*.

⁷¹ *The Venus*, 17 Fed. 926; *The Oneida*, 84 id. 716.

⁷² *The Reno*, 67 C. C. A. 479, 134 Fed. 555.

§ 1291. **Total loss, what is.** The fact that a vessel sinks after a collision does not of itself warrant the conclusion, as a matter of legal judgment, that either she or her 'cargo' is a total loss.⁷³ If it appears probable that they may be raised without much expense and the vessel repaired, her owners cannot insist upon compensation as for a total loss if they have neglected to employ reasonable measures to mitigate the damage. In some cases allowance has been made for the cost of raising a sunken vessel though she was not repaired. This course has been taken when it was necessary to raise her in order to ascertain whether she should be abandoned as a total loss or not, and also when her removal was required because she was an obstruction to navigation.⁷⁴ In all these cases the vessels were sunk in rivers or harbors or in comparatively shallow water elsewhere. If the sunken vessel lies in deep water and was of comparatively little value before the collision her owner cannot incur large expense in raising her and charge the vessel in fault with it, and also with the cost of repairs, freight, demurrage and value of the cargo. In such a case the recovery will be limited to the value of the vessel, cargo, freight and personal effects before the collision occurred.⁷⁵ It is said in *The Granite State*⁷⁶ that there cannot be an established market value for barges, boats and other articles of that description as in cases of grain, cotton or stock. The value of such a boat depends upon the accidents of its form, age and materials; and as these differ in each individual, there could be no such value. A person may make considerable profits by the use of an old hulk of little value in the market for vessels. His loss cannot be measured by the ratio of her profits, as he might supply himself with another at a cheaper rate. But when the injured vessel is not a total loss, and is capable of

⁷³ *The Baltimore*, 8 Wall. 377, 19 L. ed. 463; *The Bristol*, 10 Blatch. 537; *The Thomas P. Way*, 28 Fed. 526; *The Havilah*, 50 id. 331; *The Granite State*, 3 Wall. 310, 18 L. ed. 179; *The Ernest A. Hamill*, 100 Fed. 509.

⁷⁴ *The Empress Eugenie*, Lush.

139; *The Venus*, 17 Fed. 925; *The America*, 11 Blatch. 485; *The Mary Eveline*, 14 id. 497; *The Nebraska*, 3 Bene. 261.

⁷⁵ *The Havilah*, 1 C. C. A. 519, 50 Fed. 331.

⁷⁶ 3 Wall. 310, 18 L. ed. 179.

being repaired and restored to her original situation, the cost necessary to such repair cannot be said to be an incorrect rule of damages. Where the vessel was sunk in the ocean, the water being thirteen fathoms deep, after a blow by the bow of a steamer which cut into her port side and penetrated about half way through her, and one wrecking company declined to undertake to raise her, and another refused to do so for any percentage of her value when raised, but offered to make the effort for \$3,000 contingent upon success and without regard to the value of the vessel as saved, a finding of a total loss was approved.⁷⁷

§ 1292. **Partial loss; elements of damage.** If a damaged vessel has been repaired the measure of damages is not the difference between her value in her crippled condition and before the collision, but the cost of repairing and getting her in condition to be repaired,⁷⁸ though the repairs may put her in better condition than she was in before the injury.⁷⁹ The rule is *restitutio in integrum*. Because that rule is a profitable one to the owner of an injured vessel it is not to be extended beyond the requirement of the necessities of the case. He cannot recover for the increased cost or repairs caused by the fact that, on opening up the vessel, parts adjacent to those parts injured by the collision, and not directly involved therein, are found to be unsound, so that, on that account, the cost of repairing the part injured is increased over what it would have been if the adjacent parts had been sound. There may be instances, said the court, where adjacent parts which are unsound are so closely connected with the parts directly injured by the collision that they cannot be distinguished in making repairs, so that repairs of all the parts amount only to repairs of a single whole;

⁷⁷ *La Normandie*, 7 C. C. A. 285, 58 Fed. 427.

⁷⁸ *The Schooner Catharine v. Dickinson*, 17 How. 170, 15 L. ed. 233; *Union Ice Co. v. Crowell*, 5 C. C. A. 49, 55 Fed. 87; *The Norwood*, 215 Fed. 655.

If repairs restore a vessel to her full efficiency for the purpose for

which she was constructed and used an allowance in addition to their cost will not be made on the theory that there has been depreciation in value because the repairs were not made in a different manner. *The Loch Trool*, 150 Fed. 429.

⁷⁹ *The John H. Starin*, 116 Fed. 433.

but in order to establish a proposition of that kind and thus enlarge the field of application of the rule of *restitutio in integrum* the facts should be very clear and strong.⁸⁰ The reasonable value of the repairs made, and not the amount paid therefor, is the rule of damages, especially if there has been negligence in not procuring surveys on notice and in ascertaining the probable damages before accepting the only bid for making the repairs.⁸¹ The cost of temporary repairs is not the measure of recovery; the owner is entitled to such sum as will restore the vessel to the condition she was in before the injury.⁸² Where the repairs are so extensive as to practically amount to a rebuilding of the vessel the measure of damages is the value at the time of injury less the net salvage.⁸³ By refusing the lowest offer to repair his vessel the owner must show that she would have been injured by removing her to the place where repairs pursuant to such offer would have been made. He may recover the dock expense while the vessel was there pending the negotiations concerning the repairs.⁸⁴ Inability to repair a permanent injury at a reasonable cost justifies an allowance in addition to the cost of the repairs made.⁸⁵ The rule of liability for the cost of repairs has been disregarded where the damage done might as well be attributable to the worn-out or rotten condition of the vessel as to the collision. Both vessels were treated as at fault, and the injured one recovered one-half the cost of the repairs.⁸⁶

Demurrage can only be recovered when profits have act-

⁸⁰ The *Rickmers*, 73 C. C. A. 415, 142 Fed. 305; The *Providence*, 38 C. C. A. 670, 98 Fed. 133.

If the repairs are in excess of what was made necessary by the collision the difference between the appraised value of the vessel and the sum she sold for before the repairs were made, measures the damages. The *Marie Palmer*, 173 Fed. 569.

⁸¹ The *Robert Hadden*, 68 Fed. 1017.

Prima facie evidence of the cost of repairs is made by showing the

necessity therefor, that they were made at the lowest prices, and payment of the bills. The *Bratsberg*, 127 Fed. 1005.

⁸² The *Elmer A. Keeler*, 194 Fed. 339.

⁸³ *Shaver Transp. Co. v. Columbia Contract Co.*, 208 Fed. 347.

⁸⁴ The *M. Kalbfleisch*, 59 Fed. 198.

⁸⁵ The *McIlvaine*, 126 Fed. 434, citing The *Helgoland*, 79 id. 123.

⁸⁶ The *John R. Penrose*, 86 Fed. 696; The *Smedley*, 216 Fed. 926.

ually been, or may reasonably be supposed to have been lost, and the amount of such profits has been proved with reasonable certainty.⁸⁷ The English law on this point may not be harmonizable with the rule just stated. In a recent case in the house of lords a steam dredger was injured and its owners were deprived of the use of it for some weeks, and the works on which they were engaged were delayed. The dredger belonged to trustees who were charged with the duty of maintaining a harbor and waterway; their funds were derived from rates, and they were not entitled to distribute profits. It was held, reversing the court of appeal,⁸⁸ that though the trustees were not out of pocket in any definite sum they were entitled to recover damages for the loss of the use of the dredger. The ground upon which the court of appeal proceeded was that it was not shown that the plaintiffs had sustained any tangible pecuniary loss. The Lord Chancellor said: I am not quite certain that I understand what is meant by the use of the word "tangible." If by that is meant that, in order to entitle a plaintiff to recover, you must be able to show that during the period of repair to his vessel, or his cart, or his horse, some specific money has been lost by the period of time during which the article has not been susceptible of being used, the principle so affirmed would, as it appears to me, go very far beyond the particular case now before your lordships. But to my mind it is a principle for which there is no authority whatever. This public body has to pay money like other people for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights which other people possess, of obtaining damages for the loss occasioned by the negligence of the wrong-

⁸⁷ *The North Star*, 80 C. C. A. 536, 151 Fed. 168; *The Loch Trool*, 150 Fed. 429; *The Conqueror*, 166 U. S. 110, 41 L. ed. 937; *The Saginaw*, 95 Fed. 703; *The Emerald*, [1896] Prob. Div. 192.

Reasonable certainty that a ves-

sel would have obtained a profitable charter entitles her to recover the probable earnings she would have made. *The North Star*, 140 Fed. 263.

⁸⁸ *The Emerald*, *supra*.

doer.⁸⁹ As interpreted in a subsequent case⁹⁰ the principle here declared is that where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages. In the case last cited a lightship was damaged in a collision caused by the negligence of the defendants. The place of the damaged ship was, during the time of her repair, taken by another ship which was maintained at an annual expense for the purpose of such emergency. It was held that the harbor board was entitled to recover not only the out-of-pocket expenses caused by the collision, but also substantial damages for the loss of the services of the damaged ship during the time her place was taken by the substituted ship. Following the case last cited it has been ruled in favor of a government whose war vessel was laid up for repairs that the contingency that she might have been needed for use was ground for allowing damage in the nature of demurrage while repairs were being made. In other words, if the owner of property is deprived of the use of it he need not show he would have used it; liability results from putting it out of his power to use it.⁹¹ The value of the work done by a dredger maintained by the public for its service may be recovered during the time of her disability. Such value may be arrived at by proving the cost of maintaining and working her and adding thereto the depreciation in her value at the time of the collision. Profits were not an element of the damages, no second vessel having been hired to take her place.⁹²

“In order to make full compensation and indemnity for what has been lost by the collision, *-restitutio in integrum*, the owners of the injured vessel are entitled to recover for the loss of her use while laid up for repairs. When there is a market price for such use that price is the test of the sum to be recovered.

⁸⁹ Owners of No. 7 Steam Sand Pump Dredger v. Owners of S. S. Greta Holme, [1897] App. Cas. 596.

⁹⁰ Owners of the Steamship Mediana v. Owners, Master & Crew of the Lightship Comet, [1900] App.

Cas. 113; The Mediana, [1899] Prob. 127.

⁹¹ The Astrakan, [1910] Prob. Div. 172.

⁹² Mersey Docks & H. Board v. The Marpessa, [1907] App. Cas. 241.

When there is no market price, evidence of the profits that she would have earned if not disabled is competent; but from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it; in no event can more than the net profits be recovered by way of damages; and the burden is upon the libellant to prove the extent of the damages actually sustained by him."⁹³ The expenses of the vessel from the port of departure to the place of collision and return from thence to a port of repair have been disallowed on the theory that the voyage might not have been a profitable one.⁹⁴ There are cases which ignore some of the contingencies which may have influenced the court in ruling

⁹³ *The Potomac*, 105 U. S. 630, 632, 26 L. ed. 1194, 1195, citing *Williamson v. Barrett*, 13 How. 101, 14 L. ed. 68; *Sturgis v. Clough*, 1 Wall. 269, 17 L. ed. 580; *The Cayuga*, 2 Ben. 125, 7 Blatch. 385, 14 Wall. 270, 20 L. ed. 828; *The Gazette*, 2 W. Rob. 279; *The Clarence*, 3 id. 283. To the same effect are *The Umbria*, 166 U. S. 404, 41 L. ed. 1053; *The Mayflower*, Brown's Adm. 376; *The Belgenland*, 36 Fed. 504; *The Gorgas*, 10 Ben. 666; *The Argentino*, 13 Prob. Div. 191, 14 App. Cas. 519; *The Mary Steele*, 2 Low. 370; *The Armonia*, 26 C. C. A. 338, 81 Fed. 227; *La Champagne*, 53 Fed. 398; *The Bulgaria*, 83 id. 312.

In the case before the court demurrage was allowed for the loss of three trips in the established trade of the vessel on the basis of the profits which according to the average of her whole business for the season she would have realized on that number of trips. This allowance was made, instead of the charter value of the vessel, because she was engaged in a regular established line for which she was peculiarly fitted, and her charter value could not be satisfactorily ascer-

tained; neither could her place be supplied by a vessel equally fitted for the service. No deduction was made for insurance or for wear and tear or for necessary repairs at the end of the season. It did not appear that there was any need of repairs at the time of the collision, nor that there was any decrease in the cost of insurance while the repairs were being made. On these considerations a majority of the court were unable to say as matter of law that the damages were excessive. See *The Margaret J. Sanford*, 37 Fed. 148.

The rule stated in the text is not applied in the courts of Ontario. *Brown v. Beatty*, 35 Up. Can. Q. B. 328.

There cannot be a recovery of profits on behalf of a vessel worked at a loss in building up a trade. *The Boldewell*, [1907] Prob. Div. 286.

The allowance of demurrage based on lost profits takes account of the expenses of the vessel, including wages and food of the crew. *The Marie Palmer*, 173 Fed. 569.

⁹⁴ *Memphis, etc. P. Co. v. The H. C. Yaeger*, 4 Fed. 927.

the proposition last stated. In an English case⁹⁵ the injured vessel was in ballast on a voyage from Antwerp to Montreal to load a cargo of grain. She collided with another vessel October, 10, and was compelled to put into Queenstown for repairs. She was under a profitable charter, which her owners did not abandon until it became apparent to them that she could not be repaired in time to resume her voyage and enter upon the performance of her charter until after the time the St. Lawrence is usually closed for navigation. The abandonment of the charter being justifiable, it was ruled that the loss of the profit which would have accrued from its performance was a ground of damage in favor of the vessel owners. It has been pointed out,⁹⁶ that there were several contingencies which made it uncertain whether, had no collision occurred, the charter would have been performed. There was the contingency in the first place of the vessel's ever reaching Montreal; and second, of her charterers being ready to furnish her with the stipulated cargo, and also whether she would accomplish the homeward voyage and earn her freight. It is essential to the right to recover dead freight as an item of damage that the vessel which has lost freight in consequence of a collision shall make reasonable efforts to secure a fresh cargo.⁹⁷ If an existing charter is lost in consequence of a collision and a charter at lower rates is necessarily taken for the residue of the charter period the vessel owner is entitled to compensation for the loss resulting up to the expiration of the original charter.⁹⁸ It is not a valid reason for refusing demurrage that its allowance, added to the cost of the repairs, will make a sum in excess of the value of the vessel before the collision, if the owners acted with care, skill, diligence and fidelity and in good faith in the course pursued, and the excess of the cost of repairs over the estimates could not have been foreseen.⁹⁹ Neither is it a sufficient reason for disallowing demurrage while

⁹⁵ *The Consett*, 5 Prob. Div. 229, [1880]; *The Argentino*, 13 id. 61 [1888].

⁹⁶ *The Hope*, 5 Fed. 822.

⁹⁷ *The C. P. Raymond*, 28 Fed. 765.

⁹⁸ *The Belgenland*, 36 Fed. 504; *The Star of India*, 1 Prob. Div. 466;

The Consett, 5 id. 229.

⁹⁹ *The Glaucus*, 1 Low. 366, 372.

a boat is detained for repairs that the work she would have been put to but for the accident was done or might have been done by another boat owned by the libelants and which was at the time not otherwise employed.¹ This ruling is said to be maintainable on the ground that the owners of the disabled boat were entitled to procure another boat to take her place. It is immaterial to the wrong-doer whether the boat substituted was hired from other persons at market rates or supplied by the libelants themselves. If the latter course is pursued they are entitled to charge for the use of their own boat at the market value of its use, for the time being, as though they had hired her from other persons.² Such value is not always determinable by the net value of the charters of the disabled vessel for the days her place was taken by other vessels owned by the same person. The better rule is, where substituted service can be obtained, to measure the recovery by its cost. In *The Emma Kate Ross*, before the circuit court of appeals for the fourth circuit,³ it appeared that the vessel was twenty-one days undergoing repairs, and was chartered for all but one of them. During eight of these days her owner hired another boat to fill her engagements at a cost of \$110 per day. During the remaining days he substituted other boats of which he was the owner. It was ruled that the amount which the disabled boat would have earned under her charters was not to be taken as the measure of the wrong-doer's liability, but that the rate which was paid for the substituted vessel was the proper standard, it not appearing that she was incompetent for the service. It was not improper to apply this rule because the other vessels owned by the libelant were larger than the disabled one, and, therefore, presumably competent to earn more compensation.

The principle we have been considering and which is sustained

¹ *Coffin v. The Osceola*, 34 Fed. 921; *The State of California*, 4 C. C. A. 393, 54 Fed. 404; *The Providence*, 38 C. C. A. 670, 98 Fed. 133; *The Cayuga*, 14 Wall. 270, 20 L. ed. 828; *The Favorita*, 18 Wall. 598, 603, 21 L. ed. 856, 859; *The North Star*, 140 Fed. 263.

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² *New Haven S. Co. v. Mayor*, 36 Fed. 716; *The Emma Kate Ross*, 46 id. 872; *The Favorita*, 18 Wall. 598, 21 L. ed. 856; *The Cayuga*, 14 id. 278, 20 L. ed. 829, 7 Blatch. 385.

³ 2 C. C. A. 55, 50 Fed. 845.

by an unbroken current of American adjudications was not formerly recognized in England to the same extent it is here. It was there held by the privy council that indemnity for consequential loss from the detention of a vessel can only be recovered where an actual loss resulting therefrom is shown, and reasonable proof of its amount is made. This principle was applied by holding that a claim for demurrage during the detention of a vessel injured in a collision while a substituted vessel, the property of the same owners, was doing at the defendant's expense and indemnity for loss occasioned by the substitution, the work which the disabled vessel ought to have done, is not recoverable. In other words, only such sum could be recovered as would reimburse the owners for the actual outlay they incurred, such as for the lodging, maintenance and wages of the crew; loss of profits which might have been earned by the particular vessel were not an element of the damages.⁴ The recovery of such profits is not allowable in Ontario, nor is the expense of hiring another vessel to take the place of the one injured.⁵ The English case just cited is overthrown by the decisions of the house of lords in the cases stated in the first paragraph of this section. Doubtless the Canadian courts will change the rule there to conform to the law as declared in those cases. The lord chancellor's discussion of *The City of Peking* is very interesting, and tends to harmonize it with the rule laid down in the cases referred to.

The allowance in favor of a vessel damaged while she is being repaired is measured by the value of her use. The rate of demurrage stipulated for in the charter, it has been held, is not evidence of such value in favor of her owner against a third person,⁶ but there are authorities to the contrary.⁷ If the rate so stipulated is adopted as the value of the use of a vessel there cannot be also a recovery for wharfage and fees for

⁴ *The City of Peking*, 15 App. Cas. 438 (1890).

⁵ *Brown v. Beatty*, 35 Up. Can. Q. B. 328.

⁶ *The Jas. A. Dumont*, 34 Fed. 428; *The Margaret J. Sanford*, 37 id. 148.

⁷ *The Gov. Ames*, 187 Fed. 40; *The Rebecca v. The America*, Fed. Cas. No. 11, 619; *The Columbia*, 48 C. C. A. 596, 109 Fed. 660, citing *Orhanovich v. The America*, 4 Fed. 337, 342; *The Silica v. The Lord Warden*, 30 id. 845.

watchmen, because "demurrage" includes these.⁸ The damages recoverable include a charge for wharfage and necessary commissions when there is not an acceptance of the rate of demurrage thus fixed.⁹ If expenses have been judiciously incurred in saving property and thus reducing the amount of the loss, they are recoverable,¹⁰ although the loss may have been increased by the efforts made.¹¹ Under this head a recovery has been allowed for expense in unloading the vessel and for the cost of boarding her passengers during the delay beyond the scheduled time of sailing.¹² In awarding compensation for the time a vessel was obliged to lay by in order to have necessary repairs made the allowance will not be extended beyond that actually required for that purpose in a place equipped for making them.¹³ Nor will full allowance be made where the work is done with unreasonable slowness.¹⁴ Time consumed in consultation between her owner and an attorney in deciding on the former's course will not be regarded.¹⁵ There cannot be a recovery of what might have been earned on a voyage voluntarily abandoned in order that the vessel might undertake one for which she was previously chartered where the delay in making repairs was extended beyond the time necessary to repair the damage done by the collision in order to make other repairs which would need to have been made in the near future. In such a case the recovery was limited to one-half the value of her use while she was undergoing repairs.¹⁶ If expenses have been incurred in retaining the crew during the time repairs were being made there may be a recovery of the amount.¹⁷ One of the owners of an injured vessel cannot recover for his time devoted to over-

⁸ The *C. P. Raymond*, 28 Fed. 765.

⁹ The *Jas. A. Dumont*, 34 Fed. 428; The *Fannie Tuthill*, 17 id. 87.

¹⁰ The *Mary S. Lewis*, 126 Fed. 848; *Seabrook v. Raft of Railroad Cross-Ties*, 40 Fed. 596; *Hoffman v. Union F. Co.*, 68 N. Y. 385.

¹¹ The *Narragansett*, *Olcott* 246, 267.

¹² The *Saginaw*, 95 Fed. 703.

¹³ The *Sovereign of the Seas*, 137 Fed. 812.

¹⁴ *Davis v. Atlantic Dredging Co.*, 212 Fed. 351.

¹⁵ *Seabrook v. Cross-Ties*, *supra*.

¹⁶ The *Sequoia*, 132 Fed. 625. But see § 157.

¹⁷ *Hoffman v. Union F. Co.*, 68 N. Y. 385; The *Switzerland*, 67 Fed. 617; The *Bulgaria*, 83 id. 312; *Fisk v. City of New York*, 119 id.

seeing repairs to her, it not being shown there was a necessity for his so doing, that his services were of any value, or had been paid for, or payment promised by his co-owners.¹⁸ Nor can the owner recover the salary paid his superintendent in charge of his dredging work during the time the dredge was being repaired, it appearing the latter attended to his usual duties notwithstanding the overseeing of the repairs.¹⁹ A foreign owner may recover the reasonable commission paid an agent residing in the country in which the repairs were made for the disbursement of the funds needed to meet the expense thereof, and also a reasonable fee for his services in superintending the repairs and in preparing the contract therefor.²⁰ Dry dockage rendered necessary in order that repairs may be made may be recovered for, as may the cost of new sails bought to replace old ones used for stopping leaks caused by the collision, it not appearing that the latter could have been repaired.²¹ In addition to the cost of dockage, there may be a recovery of the reasonable expense of securing a new rating of the vessel and of the wages of a watchman while she was being repaired.²² The recovery for demurrage must not exceed the sum which the boat as such, and without men or supplies, could have been chartered for.²³ If the owner elects to have his vessel sold in a damaged condition demurrage is not recoverable because interest is the legal indemnity for delay in collecting the balance of her original value from the wrong-doer.²⁴ Demurrage is not recoverable where a pleasure yacht is injured, no actual loss being shown; the expense of caring for her during the time repairs are being made may be recovered.²⁵

256; *The Mary S. Lewis*, 126 Fed. 848.

¹⁸ *The State of California*, 4 C. C. A. 393, 397, 54 Fed. 404.

¹⁹ *The McIlvaine*, 126 Fed. 434; *The Sarah Thorp*, 46 id. 816; *The Itasca*, 117 Fed. 885.

²⁰ *The Dorchester*, 134 Fed. 564.

²¹ *The Switzerland*, 67 Fed. 617.

²² *The Sequoia*, 132 Fed. 625.

²³ *The Emilie*, 4 Bene. 235.

²⁴ *La Champagne*, 53 Fed. 398.

Demurrage has been allowed up to the time of sale although it was made before the repairs were. *The Cumberland*, 135 Fed. 234, citing *Philadelphia S. T. Co. v. Philadelphia R.*, Fed. Cas. No. 11,085, *aff'd* 23 How. 209, 16 L. ed. 433.

²⁵ *Fisk v. City of New York*, 119 Fed. 256.

The value of the use of a vessel while detained may be proved otherwise than by the opinions or estimates of experts. A satisfactory way of making such proof is to show the time lost, and her average earnings for a reasonable time prior and subsequent to the collision.²⁶ In the absence of evidence showing the market value of the use of a vessel the value of her use to the owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for her detention, and the books of the owner showing her earnings about the time of the collision are competent evidence of her probable earnings during the time of her detention.²⁷

§ 1293. **Same subject.** As a general rule a vessel which has been damaged may be repaired at the place where the damage was done if that is practicable; but unnecessary expense must not be incurred. If the cost of making repairs there is exceptionally great and the owner voluntarily takes his vessel to another place where they are made at much less cost, his recovery must not exceed the amount he actually pays for them, including the time and expense of moving her from one place to the other. The fact that an estimate of the expense of repairs was made by surveyors at the port where the damage was done does not suspend the application of this rule.²⁸ If a vessel sunk by a collision is raised and found to be in such a condition that it is prudent and practicable to repair, if her owners act with promptness they may recover the cost of raising her and her cargo and of making such temporary repairs as she may need,²⁹ and also the sum it costs to put the vessel, her furniture and fittings into as serviceable a condition as she and they were in before the collision occurred, as well as a reasonable amount of demurrage and compensation for damage sustained by the cargo.³⁰ If the crew join with the vessel owners in a libel against the vessel in fault they may recover for the loss of their personal effects; but their value should not be put at what it

²⁶ *The State of California*, 4 C. C. A. 393, 54 Fed. 404; *Thompson v. Winslow*, 130 Fed. 1001.

²⁷ *The Conqueror*, 166 U. S. 110, 127, 41 L. ed. 937, 945; *Sturgis v. Clough*, 1 Wall. 269, 17 L. ed. 580.

²⁸ *The City of Chester*, 34 Fed. 429.

²⁹ *The Catharine v. Dickinson*, 17 How. 170, 15 L. ed. 233.

³⁰ *The Minnie*, 26 Fed. 860; *Comerford v. The Melvina*, 43 id. 77.

would cost to replace them.³¹ If the injured vessel is free from fault the expense of towing her to her home port for permanent repairs, instead of stopping at an intermediate port for temporary repairs, may be recovered if the damage is serious and the navigation was dangerous, in the absence of proof of ignorance or dishonesty on the part of her master.³² If making repairs results in other expenses they may be recovered; as for surveying,³³ the injuries done a vessel and the superintendence of repairs, and the readjustment of the ship's compass, her re-rating at Lloyd's, the cost of the master's protest made in a foreign port, which is required by general usage, and wages of the crew under contract during her detention.³⁴ It is otherwise as to the expense of the master's protest made in a foreign port as a means of collecting insurance, because that grows out of a contract wholly between insurer and insured and is not made necessary by the act of the wrong-doer.³⁵ The expense of saving the lives of the crew of the wrecked vessel and returning them to the nearest port may be recovered. Such services are regarded as being rendered in the performance of a maritime duty, and not as a voluntary charity merely.³⁶ Salvage money paid by the owner of a damaged vessel and interest thereon is a proper charge against the wrong-doer;³⁷ but it is otherwise as to the costs and counsel fees incurred in defending a suit to recover for salvage services.³⁸ There cannot be a recovery of the expenses of a convoy to an injured vessel unless the necessity therefor is made clear.³⁹ The recovery of damages for delay

³¹ *Id.*; *Leonard v. Whitwill*, 19 Fed. 547.

³² *The Benjamin F. Hunt, Jr.*, 34 Fed. 816; *The Fannie Tuthill*, 17 id. 87; *Comerford v. The Melvina*, 43 id. 77; *The Bulgaria*, 83 id. 312.

³³ *The Bulgaria*, 83 Fed. 312.

³⁴ *The Belgenland*, 36 Fed. 504; *New Haven S. Co. v. Mayor*, id. 716; *The Alaska*, 44 id. 498; *The Switzerland*, 67 id. 617.

It is otherwise as to the expense of re-rating if the vessel has been repaired in a different manner from

that in which she was originally constructed. *Gilkey v. The Beta*, 44 Fed. 389.

³⁵ *The Belgenland*, *supra*; *The City of Norwich*, 118 U. S. 468, 30 L. ed. 134.

³⁶ *Leonard v. Whitwill*, 19 Fed. 547.

³⁷ *The Alaska*, 44 Fed. 498; *La Champagne*, 53 id. 398.

³⁸ *Greenwood v. The Fletcher*, 42 Fed. 504; *The Favorite*, 4 Bene. 132; *The Glenogle*, 122 Fed. 503.

³⁹ *The Alaska*, 44 Fed. 498.

precludes a recovery of the expense of forwarding the cargo.⁴⁰ If all the damage was not caused by the collision, or repairs not made necessary thereby were made at the same time as those which were so made necessary, the expense of a survey and other expenses arising out of making them will be divided between the vessel at fault and the libellant.⁴¹

§ 1294. **Interest.** Where the loss is only partial the probable earnings have been allowed the libellant if there was no more certain mode of arriving at his loss by the detention of his vessel while repairs were being made. In such cases, and also where the charter value of the vessel is recovered, there cannot also be a recovery of interest. But interest has been allowed on the damages recovered for detention as part of such damages,⁴² and on all the items recoverable where the loss was partial,⁴³ including the sum paid for wrecking services.⁴⁴ Where other vessels were substituted for the one injured while repairs were being made, interest on the value of the latter was allowed in the absence of clear proof of what the value of her services was.⁴⁵ If there is a total loss interest on the value of the vessel or cargo is recoverable from the date of the casualty,⁴⁶ unless there is a recovery on some other basis than that of the value of the lost property. It is said, however, that the recovery of interest is a matter of discretion whether the loss is partial or total.⁴⁷ Where it is partial only and the vessel proceeded against has been bonded in limited liability proceedings under the federal statutes in a fixed sum to "abide and answer the decree," interest is not to be computed until the date of the decree of the district court;⁴⁸ and so where both vessels are at fault.⁴⁹ Some

⁴⁰ *The Glenogle*, 122 Fed. 503.

⁴¹ *The Bratsberg*, 127 Fed. 1005; *The John F. Gaynor*, 124 id. 743.

⁴² *The Natchez*, 24 C. C. A. 89, 78 Fed. 183.

⁴³ *The Bulgaria*, 83 Fed. 312; *The Oregon*, 89 id. 520.

⁴⁴ *The John H. Starin*, 116 Fed. 433.

⁴⁵ *Great Lakes T. Co. v. Kelley Island L. & T. Co.*, 100 C. C. A. 108, 176 Fed. 492.

⁴⁶ *Guibert v. British Ship George*

Bell, 3 Fed. 581; *The Rabboni*, 53 id. 952; *The Reno*, 67 C. C. A. 479; 134 Fed. 555.

⁴⁷ *The North Star*, 140 Fed. 263, 44 id. 492, 62 id. 71, 10 C. C. A. 262, 278; *Bethell v. Mellor*, 135 Fed. 445; *The Eliza Lines*, 65 C. C. A. 538, 132 Fed. 242.

⁴⁸ *The Manitoba*, 122 U. S. 97, 30 L. ed. 1095; *The José E. Moré*, 37 Fed. 122; *The H. F. Dimock*, 23 C. C. A. 123, 77 Fed. 226.

⁴⁹ *The Itasca*, 117 Fed. 885.

discretion is exercised in fixing the time from which interest is allowed. In some courts the rule is to allow it on unliquidated demands from the time of judicial ascertainment of the amount of the damage done. It is ground for allowing it from an earlier time if the suit has been pending a long time and many of the large items involved were not questioned.⁵⁰ In the second circuit it may be allowed in the discretion of the court from the date the disbursements were made.⁵¹ It has been refused after decree where both vessels were at fault.⁵² Interest on the cost of repairs is not to be computed prior to the time the money was to be paid.⁵³ If a vessel is permanently injured compensation is due as of the time the injury was done, and interest as damages for withholding payment may be added, the computation to be made from the time of the injury.⁵⁴ It has been said that the allowance of interest upon the cost of repairs and sums expended for salvage services is a matter of discretion; if the repairs make the vessel more valuable than she was before the collision interest will not be allowed.⁵⁵ But the better rule is that it should be allowed in the absence of special circumstances rendering it inequitable.⁵⁶ Interest was given a libellant who was diligent in bringing the case to a decision, the other party having sought to delay the trial,⁵⁷ and has been refused prior to the decree affirming the award where the prosecution of the suit was long delayed.⁵⁸ It has also been recovered on the amount paid for the wreck by the purchaser during the period

⁵⁰ *Great Lakes T. Co. v. Kelley Island L. & T. Co.*, *supra*.

⁵¹ *The Mahanoy*, 127 Fed. 773.

⁵² *The Glenochil*, 128 Fed. 963.

⁵³ *The Sitka*, 156 Fed. 427. See *infra*.

⁵⁴ *The Marie Palmer*, 173 Fed. 569; *The Harold*, 84 Fed. 698; *The Crathie*, [1897] Prob. 178.

Where a vessel was so badly injured as to necessitate a rebuilding interest was allowed from the date of the injury on her then value less the net salvage. *Shaver Transp.*

Co. v. Columbia Contract Co., 208 Fed. 347.

⁵⁵ *The Alaska*, 44 Fed. 498; *The Syracuse*, 97 id. 978; *The Rickmers*, 73 C. C. A. 415, 142 Fed. 305.

⁵⁶ *Harrison v. Hughes*, 119 Fed. 997, citing *The M. Kalbfleisch*, 59 id. 198; *The Natchez*, 24 C. C. A. 49, 78 Fed. 183; *Brent v. Thornton*, 45 C. C. A. 214, 106 Fed. 35; *The James A. Dumont*, 34 id. 428; *The Bulgaria*, 83 id. 312.

⁵⁷ *The Rabboni*, 53 Fed. 948.

⁵⁸ *The Sovereign of the Seas*, 139 Fed. 812.

required by him to make repairs;⁵⁹ and on the sum awarded as demurrage for delay in making negotiations respecting repairs made necessary by the collision.⁶⁰ One who appeals from a decree in his favor thereby puts it out of the power of the other party to pay, and is not entitled to interest on his original recovery pending the appeal.⁶¹ Where intervening petitions claiming damages are filed after the discharge of the vessel on stipulation and are treated as original libels, interest on the sum recovered will be computed from the time the order for issuing process was granted.⁶² Where the libelant materially changed his case on appeal by new evidence he was allowed interest on the expenditures for repairs only from the time of filing the mandate of the appellate court.⁶³ On the affirmance of a decree for the libelant, which included interest, he will be allowed interest on the entire sum decreed him in the absence of special circumstances.⁶⁴ The general principle that the government is not liable for interest in tort actions is applicable to proceedings against it for the fault of one of its vessels unless the statute authorizing the suit provides for the recovery of it.⁶⁵ Interest is not allowable on damages for personal injury or death until the amount is judicially ascertained and determined either by judgment,⁶⁶ by decree in proceedings for limitation of liability,⁶⁷ or by a commissioner's report,⁶⁸ in which case it may be allowed as a matter of discretion from the completion of the report and notice thereof given to the parties, where considerable time has elapsed before confirmation and decree. While ordinarily the rate of interest allowed by courts of

⁵⁹ *La Champagne*, 53 Fed. 398.

⁶⁰ *The M. Kalbfleisch*, 59 Fed. 198; *The J. G. Gilchrist*, 173 Fed. 666 (recoverable from date of loss or injury, disapproving *The Eloina*, 4 id. 573, and *The Sitka*, *supra*, holding that interest runs only from the date of the decree).

⁶¹ *The Express*, 8 C. C. A. 182, 59 Fed. 476.

⁶² *The Oregon*, 89 Fed. 520.

⁶³ *The Switzerland*, 67 Fed. 617.

⁶⁴ *The Umbria*, 8 C. C. A. 181, 59

Fed. 475, approving *The Blenheim*, 18 Fed. 47, and disapproving *Deems v. Canal Line*, 14 Blatch. 474.

⁶⁵ *Pennell v. United States*, 162 Fed. 75; *Watts v. Same*, 129 id. 222. See § 332.

⁶⁶ *Burrows v. Lownsdale*, 66 C. C. A. 650, 133 Fed. 250.

⁶⁷ *The Argo*, 127 C. C. A. 456, 210 Fed. 872.

⁶⁸ *Union Steamboat Co. v. Chafin's Adm'rs*, 122 C. C. A. 598, 204 Fed. 412.

admiralty is not affected by state laws, it being usually six per cent.,⁶⁹ yet it has been held that on damages resulting from collision on inland waters within the jurisdiction of a state interest will be allowed at the statutory rate of such state both before and after decree.⁷⁰

§ 1295. **Mitigation of liability.** The common-law doctrine that a wrong-doer's liability is not mitigated by a benefit accruing to the injured party from his contract with another applies in admiralty. Hence the payment of insurance upon a lost vessel does not lessen the liability of the party responsible for a collision;⁷¹ nor is liability for depreciation in the value of a cargo affected because the owner obtained a rebate of duty on account of its damaged condition.⁷² In an action to recover for damage done a barge which was in tow of a consort belonging to the owners of the barge the value of the use of the latter is not to be lessened by the rule which fixes the value of towage generally, but only the actual expense of the towage in the particular case.⁷³ The duty of the owner of a vessel to endeavor to raise and repair her and save the cargo exists only where there is a reasonable probability that the loss can be thereby mitigated; he may act on the report of experts sent by the insurer to investigate the practicability of raising her or removing her cargo.⁷⁴

§ 1296. **Recovery by owner of cargo; who may sue.** Where a cargo is lost at sea as the result of a collision its owner is entitled to recover the prime cost or market value of it at the place of shipment, with all charges of lading and transportation, including insurance and interest, but without any allowance for anticipated profits.⁷⁵ In some cases where the cargo has been recovered and sold after various expenses were incurred in

⁶⁹ *The Aleppo*, 7 Bene. 120, Fed. Cas. No. 158 (following *Hemmenway v. Fisher*, 20 How. 258, 15 L. ed. 799; *The Oregon*, 89 Fed. 520; *The Norwood*, 215 Fed. 655.

⁷⁰ *Cambria S. S. Co. v. Pittsburgh S. S. Co.*, 129 C. C. A. 210, 212 Fed. 674, 51 L.R.A.(N.S.) 966.

⁷¹ *The Monticello v. Mollison*, 17

How. 152, 15 L. ed. 68. See § 158.

⁷² *The Umbria*, 8 C. C. A. 194, 59 Fed. 489; *The Eroë*, 17 Blatch. 16.

⁷³ *The Cayuga*, 8 C. C. A. 188, 59 Fed. 483.

⁷⁴ *Pettie v. Boston T.-B. Co.*, 49 Fed. 464.

⁷⁵ *The Aleppo*, 7 Bene. 120; *The Umbria*, 8 C. C. A. 194, 59 Fed. 489;

putting it in proper order the rule of damages has been declared to be the difference between the market value of the goods if uninjured and their value as damaged.⁷⁶ When the goods have no ascertainable market value at the place of shipment indirect means must be resorted to for the purpose of ascertaining their real value there. In a case where the loss was of a cargo of guano, owned by the Peruvian government, the loss having occurred while the cargo was in transit to New York, it was held that evidence of value based upon an estimate of the price at which sales of it were usually made in New York, with a fair deduction for profits and expenses of every kind, afforded a just basis for fixing the measure of recovery.⁷⁷ It has been said that it is immaterial to the application of this rule how near the lost vessel may have been to her port of destination at the time the collision occurred.⁷⁸ In the absence of a market for property at the place for which it was destined it will be assumed it was worth at least what it cost at the place of shipment, with the freight charges added.⁷⁹ In several cases, however, as where whales captured at sea have been tortiously converted in regions where there was no market for them or their products, in order to do justice the courts have been obliged to adjust their value by the price at the controlling market of the country in which the suit has been brought at the time the vessel which sustained the loss could have reached there without unreasonable delay, less the expense of carrying the product to that market.⁸⁰ The same rule has been adopted where there have been collisions between whaling and fishing vessels.⁸¹ In the case last referred to the court allowed the price at the

The *Scotland*, 105 U. S. 24, 26 L. ed. 1001; The *Oceanica*, 156 Fed. 306; The *Eagle Point*, 136 Fed. 1010.

⁷⁶ The *Umbria*, *supra*.

⁷⁷ The *Scotland*, 105 U. S. 24, 26 L. ed. 1001. In The *Joshua Barker*, Abb. Adm. 215, there was a loss of cargo through the sole fault of the vessel which had it on board. The damages were measured by its value at the place of delivery.

⁷⁸ *Guibert v. British Ship George*

Bell, 3 Fed. 581; The *Amiable Nancy*, 3 Wheat. 546, 4 L. ed. 456; The *Vaughan and The Telegraph*, 14 Wall. 258, 267, 20 L. ed. 807, 809.

⁷⁹ The *Olympia*, 156 Fed. 252.

⁸⁰ *Bourne v. Ashley*, 1 Low. 27; *Bartlett v. Budd*, id. 223; *Taber v. Jenny*, 1 Sprague 315.

⁸¹ *Swift v. Brownell*, 1 Holmes 467; *Guibert v. British Ship George Bell*, 3 Fed. 581.

nearest port, which was not remote from the place where the injury occurred, such port being a market for fish, and refused to allow the price at the port for which the vessel was destined. It was contended that, inasmuch as in collision cases where freight has actually been contracted for, the freight then pending, less the expense of completing the voyage, is allowed as part of the damages, and that in the case of a fishing vessel, the fish on board not having cost anything, the difference between the price at the port nearest which the loss occurred and the price at the port of destination should not be regarded as profit but as the freight earned by the vessel and wages earned by the crew according to the several and respective shares of the former and the latter in the proceeds of the "catch." The court thought the application of the rule contended for would open the doors to the very dangers and uncertainties sought to be excluded by the decisions directed against the recovery of profits in any shape; but allowed the value of the fish at the nearest port without deducting the small expense which would have been incurred in reaching there, and also interest on such value from the time of the collision, but refused to make an allowance for the fish which the master reported might have been taken with reasonable certainty during the portion of the fishing season and which the collision deprived the appellants the benefit of.⁸² Where a cargo of dates gathered on the river Euphrates was lost it was held that the shipper might recover as part of his damages the expense of sending an agent there to superintend the picking and the rent of a house for one year for the shelter of the men employed, though the use of the house continued but for six weeks. It appeared that houses are usually rented for that term by those engaged in the business of gathering the fruit.⁸³ If a collision occurs in American waters the cargo owner may recover average charges legally assessed against the cargo in the foreign port of destination because of the collision, regardless of the time of their payment.⁸⁴ Where

⁸² *Guibert v. British Ship George*
Bell, *supra*.

⁸³ *The Umbria*, 46 Fed. 927.

⁸⁴ *The Energia*, 13 C. C. A. 653,

61 Fed. 222, 66 Fed. 604; *Erie & W.*
T. Co. v. Chicago, 101 C. C. A. 170,
178 Fed. 42.

cargo was laden on board at a foreign port for an English port and, owing to a collision, was damaged and landed and sold at another English port than that for which it was destined the recovery was measurable by the sound value of the cargo if it had been duly delivered, less the net proceeds of the sale.⁸⁵

A shipper or consignee who has freight on either of two vessels which come into collision with each other, or on a third vessel which is injured by others, may proceed in a common-law court or in admiralty, by a proceeding *in rem* or by a libel *in personam*, against the owner of either or both the offending vessels and recover the entire amount of his damages.⁸⁶ If the proceeding is in admiralty against both the offending vessels the decree should be against each of them for one moiety of the entire damages to the extent of the value of the vessels respectively; any balance of the moiety in excess of the value of either vessel which may not be collected is a charge against the other to the extent of its value beyond its own moiety.⁸⁷ In case of a collision between British vessels mutually in fault a United States court of admiralty will apply the English rule and permit the cargo owner to recover but one-half the loss from either vessel.⁸⁸

The right of the owner or master of the vessel as bailee of all cargo, prior to its delivery, to sue for the benefit of the owners for injuries caused by others to their property,⁸⁹ is not affected by the Harter act.⁹⁰ But the charterer of a vessel for a fixed sum, he having full control and management, may not so sue; her contributory fault is imputed to him.⁹¹

⁸⁵ *The Activ*, 17 Times L. Rep. 351.

⁸⁶ *The Atlas*, 93 U. S. 302, 23 L. ed. 885; *The Juniata*, 93 U. S. 337; *The Britannic*, 39 Fed. 395; *The Ruth*, 178 Fed. 749.

⁸⁷ *The Alabama and The Gamecock*, 92 U. S. 695, 23 L. ed. 763.

⁸⁸ *The Eagle Point*, 73 C. C. A. 569, 142 Fed. 453, reversing s. c., 136 Fed. 1010.

⁸⁹ *The Beaconsfield*, 158 U. S. 303, 39 L. ed. 993; *The Jersey City*, 2 C. C. A. 365, 51 Fed. 527; *The Mercedes*, 108 Fed. 559.

⁹⁰ *Erie & W. T. Co. v. Chicago*, 101 C. C. A. 170, 178 Fed. 42.

⁹¹ *The Livingstone*, 104 Fed. 918, reversed on other questions 51 C. C. A. 560, 113 Fed. 879.

CHAPTER XL.

DAMAGES UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

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§ 1297. **Introductory.** The Federal Employers' Liability Act raises many new and perplexing questions, many of which are still a matter of grave doubt. Its importance may be judged from the fact that it has been estimated that it applies to at least eighty per cent. of the thousands of employees in the service of the railroads in the United States.¹

While an exhaustive discussion of the act and its construction is not within the scope of a work of this character, except in so far as it applies to the subject of damages, a brief resumé of the

¹ See Roberts' *Injuries to Interstate Employees on Railroads*, § 11.

provisions of the act and their application is essential to an understanding of the subject. For reasons which will be apparent it was deemed advisable to treat the entire subject in a single chapter, independently of other divisions of the Law of Damages as applied to personal injuries.

§ 1298. Historical. In 1906 congress passed the first Federal Employers' Liability Act. This act applied to all common carriers engaged in interstate commerce and their employees. It was declared invalid by the United States Supreme Court because of its application to all carriers, and all of their employees irrespective of whether or not either one or both were engaged in interstate commerce at the time of the injury.²

The decision of the supreme court invalidating the first act was handed down January 6, 1908, and on April 22, 1908 the second act was approved.³

§ 1299. Scope of act. In some of its provisions the act resembles acts in force in a few of the states, notably Texas.⁴

The first section of the act of 1908 provides that every common carrier by railroad engaged in interstate or foreign commerce, shall be liable to any person injured "while he is employed by such carrier in such commerce," or in case of his death, to his personal representative, for the benefit of the surviving spouse and children of such employee; "and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines,

² First Employers' Liability Cases, 207 U. S. 463, 52 L. ed. 297, aff'g Brooks v. Southern Pac. Co., 148 Fed. 986, and Howard v. Illinois Cent. R. Co., 148 Fed. 997.

³ 35 U. S. Stat. at L. 65, c. 149.

⁴ Vernon's Sayles' Stats. Art. 6649; San Antonio, U. & G. R. Co. v. Moya, — Tex. Civ. App. —, 173 S. W. 608.

Oregon Employers' Liability Law, sec. 6: "The contributory negli-

gence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage." This section has been construed as requiring the jury to compare the negligence of both parties and from such relative estimate determine the percentage of negligence properly chargeable to the employer. Sonniksen v. Hood River Gas & Electric Co., 76 Ore. 25.

appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The second section is similar in tenor to the first, with the exception that it applies only to carriers by railroad in the "Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States."

Section three of the act provides that the employee's contributory negligence shall not bar a recovery, "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." It also provides that no employee shall be deemed guilty of contributory negligence "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The fourth section provides that the employee shall not be deemed to have assumed the risk where the violation by the carrier "of any statute enacted for the safety of employees" contributed to his death or injury.

The fifth section declares that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void." The carrier is permitted, however, to set off any sum which it has "contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto" on account of the injury or death.

Section six fixes the period of limitations at two years "from the day the cause of action accrued."

The seventh section defines the term "common carrier" as including "the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."

The eighth section declares that nothing in the act "shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress." It also saves pending proceedings and rights of action under the act of 1906.

Porto Rico is a "possession" within the meaning of the act⁵ and since the Employers' Liability Act cannot be given full effect unless the Safety Appliance Act is also in force in the Island, that act also applies.⁶

§ 1300. **Amendment of 1910.** Section six of the original act was amended by an act approved April 5, 1910, which added a clause providing that "action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

This amendment also added a new section to be known as section nine, which contained a very important provision: "Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

§ 1301. **Validity.** All doubts as to the validity of the act of 1908 were set at rest by the United States Supreme Court in a memorable decision.⁷ The court, in upholding the act, said in part: "The clauses in the Constitution (Art. 1, § 8, c. 3 and 18) which confer upon Congress the power to regulate commerce * * * 'among the several States' and 'to make all laws which shall be necessary and proper' for the purpose, have been con-

⁵ American R. Co. of Porto Rico v. Birch, 224 U. S. 547, 56 L. ed. 879; American R. Co. of Porto Rico v. Didricksen, 227 U. S. 145, 57 L. ed. 456, rev'g 5 Porto Rico Fed. Rep. 401, 427.

⁶ American R. Co. of Porto Rico v. Didricksen, 227 U. S. 145, 57 L.

ed. 456, rev'g 5 Porto Rico Fed. Rep. 401, 427.

⁷ Mondou v. New York, N. H. & H. R. Co., (Second Employers' Liability Cases) 223 U. S. 1, 56 L. ed. 327, 1 N. C. O. A. 875, 38 L.R.A. (N.S.) 44, rev'g 82 Conn. 373.

sidered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these: 1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on water or by land. 2. The phrase 'among the several States' marks the distinction for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally. 3. 'To regulate,' in the sense intended is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large. 4. This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce. 5. Among the instruments and agents to which the power extends are the railroads over which transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees. 6. The duties of common carriers in respect of the safety of their employees while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power."⁸

⁸ Citing *Cooley v. Philadelphia*, Wall. 558, 22 L. ed. 654; *Sherlock v. Alling*, 93 U. S. 99, 103-105, 23 12 How. 299, 315-317, 13 L. ed. 996, 1003; *The Lottawanna*, 21 L. ed. 819; *Smith v. Alabama*, 124

§ 1302. **Effect.** The supremacy of acts of Congress over state regulations in matters within the powers granted to the federal government in the Constitution was firmly established in one of the earliest decisions of the Supreme Court of the United States.⁹ "The government of the United States, then, though limited in its powers," said the court, "is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any state, to the contrary notwithstanding.'"

It follows as a necessary sequence that all state regulations affecting the liability of common carriers by railroad to their employees, while both are engaged in interstate commerce, are superseded, and the sole remedy of an employee, or his beneficiaries in case of death, where the injury or death occurs while both the carrier and the employee are engaged in interstate commerce, is under the federal act.¹⁰ Being complete and entire

U. S. 465, 31 L. ed. 508; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 99, 32 L. ed. 352; *Peirce v. Van Dusen*, 24 C. C. A. 280, 78 Fed. 693, 698-700, 69 L.R.A. 705; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 378, 37 L. ed. 772; *Patterson v. Bark Eudora*, 190 U. S. 169, 176, 47 L. ed. 1002; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. ed. 363; *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. ed. 681; *First Employers' Liability Cases*, 207 U. S. 463, 495, 52 L. ed. 297, aff'g 148 Fed. 986, 997; *Adair v. United States*, 208 U. S. 161, 176, 178, 52 L. ed. 436; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618, 55 L. ed. 878; *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. ed. 72, 3 N. C. C. A. 822.

⁹ *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

¹⁰ *Mondou v. New York, N. H. & H. R. Co.*, (*Second Employers' Liability Cases*) 223 U. S. 1, 56 L.

ed 327, 1 N. C. C. A. 875, 38 L.R.A. (N.S.) 44, rev'g 82 Conn. 373; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, Ann. Cas. 1914C 176, rev'g 189 Fed. 495; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — *Tex. Civ. App.* —, 147 S. W. 1188; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, Ann. Cas. 1914C 156, rev'g — *Tex. Civ. App.* —, 148 S. W. 1099, 3 N. C. C. A. 800; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, rev'g 98 Ark. 240; *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, aff'g 113 O. C. A. 665, 192 Fed. 919; *Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 6 N. C. C. A. 436, rev'g 204 N. Y. 135; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496; *Wabash*

in itself the act is not to be pieced out by the state laws upon the subject.¹¹

It cannot be contended that the state law giving a right of action for wrongful death in favor of persons who are not actual dependents was not superseded by the act because the two acts do not cover precisely the same field, as the act was intended to establish the nature and extent of an interstate carrier's liability to its employees engaged in interstate commerce.¹²

§ 1303. Same subject; effect on state compensation acts. The most important conflict between the federal act and state regulations which has not as yet been determined by the Supreme Court of the United States is the conflict with the various workmen's compensation acts adopted by the several states.

As will be pointed out in a subsequent chapter, liability under the compensation acts is based on contract, and the right to compensation arises *ex contractu*.¹³ In theory, it is a form of industrial insurance, the burden of industrial accidents being placed upon the industry rather than upon the workman. With but few exceptions railroads are included within the industries subject to the acts, although many expressly exclude employees "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States."¹⁴

Under these circumstances it is contended on the one hand that the remedies provided by the federal act and the compensation acts are separate and distinct, and that where there is no negligence on the part of the carrier the compensation acts apply, while, on the other hand, it is claimed that both in fact occupy the same "field," and, this being true, the compensation acts must give way to the federal law. Numerically the courts are evenly divided, New York and New Jersey adopting the

R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 6 N. C. C. A. 224, s. c. 181 Ill. App. 511, writ of error dismissed; Chicago, R. I. & P. Ry. Co. v. Wright, 239 U. S. 548, 60 L. ed. —, aff'g 96 Neb. 87.

¹¹ Jones v. Charleston & W. C. R. Co., 98 S. C. 197.

¹² Jones v. Charleston & W. C. R. Co., 98 S. C. 197.

¹³ Chapter 41, *post*.

¹⁴ New York Consol. L. c. 67, L. 1914, c. 41.

former view, while the courts of Illinois and California adhere to the latter view. Writers are equally divided on the subject.¹⁵

The question was first incidentally presented to the New York Court of Appeals in *Jensen v. Southern Pacific Company*,¹⁶ where it was claimed that the compensation act of that state did not apply to employees engaged in interstate commerce. Upon this question the court said: "The statute does not purport directly to regulate or impose a burden upon interstate commerce, but merely undertakes to regulate the relation between employers and employees in this state. Such regulation may, and no doubt does indirectly affect commerce, but to the extent that it may affect interstate or foreign commerce it is plainly within the jurisdiction of the state, until congress by entering the field excludes state action." In answer to the claim that the federal act was exclusive it was held that the question was not involved as the defendant was in fact a carrier by water, its business being "transportation by steamships which, as far as appears, may not, even indirectly, be related to transportation by railroad, certainly not by any particular line of railroad."

In a later case¹⁷ the question was squarely presented to the New York Court of Appeals, and as squarely decided. It was held that the compensation act of that state did not cover the field occupied by the federal act, and hence where there was no negligence on the part of the employer, a railroad employee injured while engaged in interstate commerce was entitled to relief under the state law. The court said in part:

"The Federal Constitution, in express terms, grants to congress jurisdiction over interstate commerce. The exercise by congress of a power granted to it by express terms supersedes all legislation on the same subject by the states. In the exercise of the power so conferred congress has prescribed the liability of carriers, for injuries resulting from negligence, to their employees while engaged in interstate commerce. 35 U. S. Stat. 65. The Federal Employers' Liability Act is therefore, in so

¹⁵ See Roberts' Annotation 9 N. C. C. A. 286, and Boyd's Article Yale Law Review, May 1916.

¹⁶ *Jensen v. Southern Pac. Co.*,

215 N. Y. 514, 9 N. C. C. A. 286.

¹⁷ *Winfield v. New York Cent. & H. River R. Co.*, 216 N. Y. 284, 10 N. C. C. A. 916.

far as it attempts to prescribe the rules of liability for injuries resulting from negligence, paramount and exclusive, and must so continue until congress shall see fit to remit the subject to the reserved police powers of the state. * * *

"Another principle which has been enunciated with the same clearness is that when the federal and state governments have jurisdiction to enter the same sphere, the state may legislate upon matters within that sphere until such time as congress shall prescribe regulations upon the same subject. * * *

"In the light of these principles, let us examine the Federal Employers' Liability Act and the Workmen's Compensation Law of this state and endeavor to ascertain whether they assume to deal with the same subject-matter. If upon examination it is found that they do, then in so far as employers and employees are engaged in interstate commerce, the provisions of the federal statute must be regarded as paramount and exclusively operative. If upon examination it is found that these two statutes do not cover the same subject-matter, we will be in a position to distinguish the different spheres in which each may be given effect. A recognition of the principles upon which the federal and state statutes are founded will demonstrate that they are not *in pari materia*. The Federal Employers' Liability Act prescribes rules under which certain employers are liable to their employees for injuries which result to the latter from negligence. The Workmen's Compensation Law is radically different in principle, purpose, scope, and method from the Federal Employers' Liability Act. It inaugurated an entirely new method of dealing with industrial accidents. Under its provisions compensation paid to the employee under the state statute is the result of injury arising in the course of employment, and is paid, regardless of fault or contract. The principle underlying the state statute is that as injuries to workmen are necessarily incident to the operation of certain hazardous occupations, the expense of compensating the employees for such injuries is properly chargeable upon the occupation. The purpose of this act was to establish an insurance fund to which employers are required to contribute, out of which fund compensation to workmen is paid, and contribution to which by the

employer relieves him of further liability. The scope of the act is much broader than the Federal Employers' Liability Act, because under its provisions the employee is awarded compensation for all accidental injuries arising in the course of his employment, whether they result from negligence or not, which are not self-inflicted or sustained as the result of intoxication. The method by which compensation is given to the employee is different from the method by which redress may be secured in an action brought under the provisions of the Federal Employers' Liability Act. Under the state statute the injured employee presents his claim to an administrative board or commission. Notice is given to the parties interested. The proceedings are informal. The compensation awarded the employee is not such as is recoverable under the rules of damages applicable in actions founded upon negligence. It is based on loss of earning power and compensation for medical, surgical, or other attendance or treatment or funeral expenses. Perhaps, without inaccuracy, it may be said that the primary purpose of this act was to give compensation in those cases where no claim of negligence on the part of the employer could reasonably be made. Having in mind the different principles which underlie the two statutes, the different purposes sought to be accomplished by them, the restricted scope of the federal statute, and the broad scope of the state statute and the different method by which redress is obtained under these statutes, can they reasonably be said to cover the same subject-matter? We are of the opinion that they cannot be so regarded. We think it is evident, also, that congress has recognized the difference between these two kinds of statutes. In enacting the Federal Employers' Liability Act it intended to occupy and exclusively pre-empt the field in which the liability of certain employers engaged in interstate commerce to their employees is prescribed when the latter were injured as the result of negligence. It did not intend to enter upon the field of compensation for industrial accidents which were not the result of negligence, but left that field open for occupancy by the state until such time as it should assume to legislate upon this subject. The view that congress intended to observe the distinction between the two kinds of

statutes referred to is fortified by the fact that it has passed a workmen's compensation law exclusively applicable to federal employees in which liability is not made to depend, either upon fault or contract (35 U. S. Stat. 556), whereas, as to certain private employments, it has regulated the subject only in those cases where the employee is injured as the result of negligence (35 U. S. Stat. 65). The Workmen's Compensation Statute of this state was not in any way designed to conflict with the authority of congress over interstate commerce. * * *

"It is true, of course, that the act is to be judged, not only by its purpose, but by what it provides may be done under it. Even considering it in the light of this principle, we think that it may lawfully be held to cover such a case as the present without in any way trespassing upon the field of federal jurisdiction. As yet, as to private employments, congress has not assumed to make any provision as to compensation for accidents not the result of negligence, and, congress not having entered upon this field, the state may lawfully do so, until such time as congress shall assume to exercise its power over this subject. The moment congress shall enter upon this field all state regulations upon the subject will be abrogated. The field which congress has pre-empted by the enactment of the Federal Employers' Liability Act is far removed from that of awarding compensation for industrial accidents that are not the result of negligence."

The reasoning of the New Jersey courts is very similar to that of the New York.¹⁸

¹⁸ *Rounsaville v. Central R. Co.*, 87 N. J. L. 371, where the court said in part, "The Federal Employers' Liability Act is an act, as its name imports, to regulate the liability of employers, and as its body shows, is applicable only to liability in tort for negligence. No new right of action is given. All that is done is to take away certain defenses which had come to be thought unjust. The legal liability of the employer under the act does

not depend upon the terms of the contract of service and is neither increased nor diminished thereby. The amount of the pecuniary liability is in no way regulated or limited. The act applies only to certain classes of employers. In all these respects the Workmen's Compensation Act differs. Liability thereunder is contractual, and, while the contract liability is implied from silence, either party is at liberty to adopt or reject this

The Illinois Industrial Board at the outset took the position that the Federal Employers' Liability Act did not supersede the State Compensation Act as to employees engaged in interstate commerce. This decision was sustained by the Illinois Appellate Court.¹⁹ But on the case being taken to the Supreme Court, the decision of the Appellate Court was reversed, the court holding squarely that congress in passing the Federal Employers' Liability Act had taken exclusive possession of the subject-matter of the liabilities of railroad companies to interstate employees. Said the court:

"Counsel on the one hand argue that under the fair construction of the Federal Employers' Liability Act as construed by these decisions (federal decisions) the act covers the field of liability of common carriers by railroad for all injuries occurring in interstate commerce, whether or not there has been neg-

statutory contract. * * * A new right of action is given, of a character unknown to our law, at least for several centuries. The liability of the employer depends, not on any fault of his own or his servants, but on whether, by act or by silence, he has adopted the statutory terms. The amount of his pecuniary liability is fixed by statute and not by the verdict of a jury. Employer and employee adopt, as a part of their contract, a novel method of procedure, in which the liability and the compensation are determined by the judge, instead of by a jury. And the compensation is ordinarily meant to be paid by installments in lieu of wages, as it were, and may be changed if circumstances change. The scheme is more like a pension scheme than a liability for a breach of contract, or damages in tort. The difference between the two kinds of legislation is illustrated in our act. Section 1 is an employers' liability act similar to the act of Congress, and regulates

the liability in a common law action of tort. Section 2 creates and regulates the new statutory right. But for paragraph 8 of Section 2 there might have been a double recovery, a recovery for the tort in a common law action, and a recovery of the statutory compensation by means of the statutory procedure. Nor would that double recovery have been illegal, however unjust it might be and was in fact considered to be by the Legislature, for compensation by way of pension from the master is quite different in character from compensation by a tort-feasor, master, or third person, for a wrong not arising out of contract. We think it clear that the act of Congress deals with an entirely separate matter from the act of our own Legislature."

In *West Jersey Trust Co. v. Philadelphia & R. Ry. Co.*, — N. J. —, 95 Atl. 753, the court adhered to its position.

¹⁹ *Staley v. Illinois Cent. R. Co.*, 186 Ill. App. 593, rev'd 268 Ill. 356.

ligence on the part of the employer, while counsel on the other side contend that the act covers only liability of common carriers in interstate commerce when there has been such negligence. It is clear there can be no recovery under the Federal Employers' Liability Act, properly construed, in the absence of negligence on the part of the employer, as that term is used in the statute and in the decisions construing the same. But if the question of negligence only determines the applicability of the Federal law, then, before it can be held that such law is applicable, there must be a final adjudication as to whether the injury resulted from negligence. Obviously Congress legislated on more than the subject of negligence. It legislated on that but also on the amount of recovery, and superseded all state laws on that subject, as shown by the decisions already cited. It also legislated on the subject of limitation when an action could be begun. * * * The wording of the statute and the reasoning in these decisions lead inevitably to the conclusion that the particular 'subject-matter,' 'field,' or 'chosen field' taken possession of by the Federal Employers' Liability Act was the employers' liability for injuries to employees in interstate transportation by rail and the real question, as clearly stated in distinct terms in several of the cases that we have quoted from in deciding whether the Federal Statute is applicable, is whether the injury for which the suit was brought was sustained while the company and the injured employee were engaged in interstate commerce. The Federal Employers' Liability Act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the Federal government. Necessarily, all common or statute law of this state on that subject has been superseded. The field of liability as to employees injured while engaged in interstate commerce on railroads is occupied exclusively by the Federal Employers' Liability Act and that, too, regardless of the negligence or lack of negligence of either party to the litigation.”²⁰

The same position was taken by the California Court of Ap-

²⁰ *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356, rev'g 186 Ill. App. 593.

peals in a case where a special agent while removing trespassers from an interstate train jumped therefrom to pursue them from the company's property. In doing so, his revolver fell from his pocket and exploded, injuring him. In holding that the Workmen's Compensation Act was inapplicable, the court said in part:

"The Congress of the United States in April, 1908, passed what is known as the Federal Employers' Liability Act which fixes the responsibility of every carrier towards its employees while engaged in commerce between the several states where any such employees are injured through the negligence of the officers, agents, or other employees of the carrier. In the year 1913, the Legislature of California passed a measure, known as the Workmen's Compensation Insurance and Safety Act (Statutes of 1913, p. 279) which provided for compensation to be awarded to employees injured while engaged in the work of their employers (except in certain employments not pertinent here) regardless of whether the accident occurred through the negligence of the employer, or his agents, servants, or other employees. It will be seen then as applied to common carriers, the state act covers precisely the same field as does the national legislation with the qualification that the said act obliges the employers to compensate employees for accidental injuries sustained without negligence on the part of his agents or employees, as well as those arising through the negligence of such persons. The United States Congress is given power by the Constitution to regulate commerce among the several states. As to the application of local or state statutes made in the exercise of the police power affecting instrumentalities of interstate commerce, it is said that this subject belongs to the reserved power of the states; that is, the power may be exercised by the states in the absence of legislation covering the same subject by Congress. When the power of Congress, however, is exerted in the direction of covering the matter sought to be so regulated and is comprehensive to that end, then the state regulation must give way before the superior law. * * * The conclusions herein expressed on the several contentions advanced by petitioner are therefore favorable to the determination as made by

the Industrial Accident Commission which declined jurisdiction of petitioner's application and dismissed his claim."²¹

Mr. Roberts, in an article written by him says: "Both statutes cannot apply in the same field and therefore both cannot cover the same injury and the question of the applicability of the two laws certainly should not turn upon the further question of the existence or absence of negligence, for if an employee is injured through the violation of the Federal Safety Appliance Act no negligence need be shown. Obviously congress by this statute intended to cover the entire field of the liability of interstate railroads to employees engaged in interstate commerce."²²

But it must be remembered that even in these states it is clearly recognized that where negligence is shown the Federal Employers' Liability Act presents the exclusive remedy.²³

Until the Supreme Court of the United States passes upon the question, the doubt created by the conflicting decisions of these strong courts must necessarily continue. It would seem, however, that the reasons underlying the decisions of the Illinois and California courts are most cogent. If the Federal Employers' Liability Act is regarded purely in the light of a *remedy* to railroad employees there is danger of overlooking the *liability*, which is the basis of the relief afforded. By its express terms the act creates a *liability* on the part of carriers by railroad to their employees in certain cases. It is reasonable to suppose that congress in passing the act intended to define the limits of the relief to be afforded the injured employee on the one hand and the liability of the employer on the other. That such a construction works a hardship and injustice to railroad employees in many cases is indisputable, but it is a condition easily remediable by congress.

§ 1304. Binding effect of federal decisions. Ordinarily state courts are required to follow the decisions of the federal courts

²¹ Smith v. Industrial Acc. Commission of California, 26 Cal. App. 560.

²² See 9 N. C. C. A. 307.

²³ Winfield v. New York Cent. & H. River R. Co., 216 N. Y. 284, 10 N. C. C. A. 916; Grybowski v. Erie R. Co., — N. J. —, 95 Atl. 764.

where the construction or application of a federal statute is involved.²⁴

It has been said that, strictly speaking, "there is no common law of negligence of the federal courts as distinguished from the common law of negligence of the state courts. The law of negligence is the same in both, and apparent differences of opinion arise because of the application of the law to different combinations of facts, and frequently on account of confusing negligence which may or may not be the cause of an injury and actionable negligence which unites cause and effect."²⁵

It has also been held that notwithstanding the different interpretations of the common law of the state by the state and federal courts, the law as applied by the federal courts "is none the less the law of that state."²⁶ However true this may be abstractly it is nevertheless true that in many important respects the rules laid down by the federal courts differ materially from the rule prevailing in the state courts. As the purpose of the federal act was to secure uniformity with respect to the liability of interstate carriers to their employees, so that their respective rights and liabilities might be determined in accordance with a single rule instead of forty-eight, common sense would dictate that in applying the act the rule prevailing in the federal courts should prevail over the state rules.²⁷ This being true it would seem to follow as a matter of course that the federal rule as to negligence, assumption of risk, contributory negligence, measure and elements of damages, and the like should be adopted even though different from the rules applied

²⁴ *Belcher v. Chambers*, 53 Cal. 635; *Breitung v. City of Chicago*, 92 Ill. App. 118; *Harris v. Lyon*, 16 Ariz. 35; *Hayden v. Town of Aurora*, 57 Colo. 389; *Cleveland, C., O. & St. L. R. Co. v. Blind*, 182 Ind. 398.

²⁵ *Saunders v. Southern R. Co.*, 167 N. C. 375.

²⁶ *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Western U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. ed. 765.

²⁷ *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa 155; *Kendrick v. Chicago & E. I. R. Co.* 188 Ill. App. 172; *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 161 Ky. 205; *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201; *Cross v. Chicago, B. & Q. R. Co.*, 191 Mo. App. 202; *Freeman v. Powell*, — Tex. Civ. App. —, 144 S. W. 1033; *Southern R. Co. v. Jacobs*, 116 Va. 189, *aff'd* 241 U. S. 229.

by the state courts. This is the view adopted by the majority of the state courts,²⁸ which hold that the relief to be had under the Federal Employers' Liability Act is to be determined in accordance with the rulings of the federal courts,²⁹ and is clearly the view of the Supreme Court of the United States.³⁰

In an action under the Federal Employers' Liability Act the Supreme Court of Kentucky said: "Though the difference between our measure of damages and that adopted by the federal courts is but slight, yet in view of the fact that plaintiff's action is predicated on federal laws, we conclude that it is better practice for trial courts to adopt the measure of damages sanctioned and approved by the Federal Supreme Court."³¹

The importance of following the rule prevailing in the federal courts in all questions relating to the construction and application of the Federal Employers' Liability Act, however, is not clearly recognized in some courts. Of course as to all questions under that act the Supreme Court of the United States in the final and ultimate source of authority, as was said by the court in an action under the Safety Appliance Act, in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all States of the Union."³²

The Missouri Supreme Court, in an action arising under the act, applied the common law of the state, upon the question of assumed risk, as laid down by the state courts, under which the servant does not assume the risk of the master's negligence,³³ which materially differs from the federal rule that an employee

²⁸ *Cross v. Chicago, B. & Q. R. Co.*, 191 Mo. App. 202; *Southern R. Co. v. Jacobs*, 116 Va. 189, aff'd 241 U. S. 229; *Freeman v. Powell*, — Tex. Civ. App. —, 144 S. W. 1033; *Glenn v. Cincinnati, N. O. & T. P. R. Co.*, 167 Ky. 453; *Farley v. New York, N. H. & H. R. Co.*, 88 Conn. 409.

²⁹ *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156.

³⁰ *Central Vermont R. Co. v.*

White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330; *Southern Ry. Co. v. Gray*, 241 U. S. 333, 60 L. ed. —, rev'g 167 N. C. 433.

³¹ *Nashville, C. & St. L. Ry. v. Henry*, 158 Ky. 88.

³² *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, rev'g 71 Ark. 445.

³³ *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 8 N. C. C. A. 538.

may be held to have assumed the risk of dangers arising from the master's negligence, providing he knows of, and appreciates them.³⁴

This decision is unquestionably wrong and cannot be sustained by reason or authority. To follow it would be to assume that there can be as many rules for recovery under the act as there are states, and that the Supreme Court of the United States will abandon its position in connection with such rules to apply the principles prevailing in the various state courts. In a later case the Missouri Court of Appeals severely criticizes the conclusion reached by the state Supreme Court but, nevertheless, felt bound to follow its decision.³⁵

§ 1305. Employers within the act. All common carriers by railroad engaged in interstate commerce are employers potentially within the act, although of course, to render the act applicable the employee must also be engaged in interstate commerce. Since under the well-known rule of agency, the act of the servant within the scope of his authority is that of the master, where the employee is engaged in interstate commerce, the employer necessarily must be so engaged. Therefore, cases passing upon the question as to when an employee is engaged in interstate commerce are in point in determining whether the employer is so engaged. This subject is treated elsewhere in this chapter.³⁶

To be within the act a railroad must also be a common carrier. A common carrier has been well defined as "one, who by the virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him and every one who undertakes to carry for compensation the goods of all persons indifferently, is, as to liability, to be deemed a common carrier."³⁷ The act itself expressly defines a common carrier as including "the receiver or receivers or other persons or corporations charged

³⁴ *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424.

³⁵ *Cross v. Chicago, B. & Q. R. Co.*, 191 Mo. App. 202.

³⁶ See § 1306, *et seq.*, *post*.

³⁷ *Jackson Architectural Iron*

with the duty of the management and operation of a business of a common carrier." ³⁸

A lumber company operating a logging road purely for its own private purposes is not a common carrier within the act; ³⁹ but where a logging road holds itself out as a common carrier, the fact that the bulk of its traffic consisted of its own products does not change its status as such, since the extent of its use by the public does not determine its character. ⁴⁰ A construction company charged with the duty of the management and operation of a common carrier by railroad engaged in interstate commerce is within the act. ⁴¹

Ordinarily the determination of what constitutes a railroad is a simple matter, but at times questions of doubt are presented. A private switch to a mill which was used by a railroad company in transporting cars in interstate commerce has been held to be a railroad within the meaning of the Safety Appliance Act. ⁴² Where under the state law the lessor of a railroad continues liable for negligence of the lessee, the lessor is within the act. ⁴³

Electric interurban railroads engaged in interstate commerce are within the act. ⁴⁴ Thus, an interurban railroad carrying freight and passengers in interstate commerce is within the act although operating in part over city streets under an arrangement with a street railway company regulating local traffic and providing for the division of the receipts in certain proportions, the control of the operation of trains being at all times vested in the interurban company. ⁴⁵ An electric interurban

Works v. Hurlbut, 158 N. Y. 34, 70 Am. St. Rep. 432.

³⁸ Act of April 22, 1898, Section 7.

³⁹ *Bay v. Merrill & Ring Lumber Co.*, 211 Fed. 717. See also, *Nordgard v. Marysville & N. Ry. Co.*, 211 Fed. 721.

⁴⁰ *Atchison, T. & S. F. Ry. Co. v. Victoria, F. & W. R. Co.*, 234 U. S. 1, 58 L. ed. 1185.

⁴¹ *Copper River & N. W. R. Co. v. Heney*, 128 C. C. A. 131, 211 Fed. 459.

⁴² *Gray v. Louisville & N. R. Co.*, 197 Fed. 874.

⁴³ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496. *Contra*, *Wagner v. Chicago & A. R. Co.*, 265 Ill. 245, aff'd 239 U. S. 452.

⁴⁴ *Ross v. Sheldon*, — Iowa —, 154 N. W. 499; *South Covington & C. St. R. Co. v. Finan's Adm'x*, 153 Ky. 340.

⁴⁵ *Kansas City W. Ry. Co. v. Mc-*

railroad has been held to be a railroad within the Federal Safety Appliance Act requiring common carriers engaged in interstate commerce by railroad to equip their locomotive engines with power driving-wheel brakes and appliances for operating the train-brake system, and to equip a sufficient number of cars in the trains with power or train brakes so that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for the purpose.⁴⁶ So also an interurban railroad has been held not to be a lateral branch line of railroad within the Commerce Act.⁴⁷

The supreme court in a proceeding under the Interstate Commerce Act held that a company chartered as a street railroad and engaged exclusively in business as such was not a "railroad" within the act.⁴⁸ The Court said:

"Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad 'subject to the act' being such that they could not be obeyed by street railroads because of the nature of their business and the character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word 'railroad' cannot be construed to include a street railroad."

The words "boats" and "wharves" refer to adjuncts or auxiliaries to transportation by railroad.⁴⁹ And the mere fact that a common carrier by railroad operates a line of steamships does not place the latter within the act unless operated in connection with the railroad system.⁵⁰ Hence, a vessel which is not part of a railroad system is not within the act.⁵¹ The mere fact that a

Adow, 240 U. S. 51, 60 L. ed. —, aff'g (Mo. App.), 164 S. W. 188.

⁴⁶ Spokane & I. E. R. Co. v. Campbell, 133 C. C. A. 370, 217 Fed. 518.

⁴⁷ United States v. Baltimore & O. S. W. R. Co., 226 U. S. 14, 57 L. ed. 104.

⁴⁸ Omaha & O. B. St. R. Co. v.

Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501.

⁴⁹ Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286, aff'g 167 App. Div. 945.

⁵⁰ Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286, aff'g 167 App. Div. 945.

⁵¹ The Pawnee, 205 Fed. 333.

canal was operated by a railroad company does not bring it within the act.⁵² A ferry boat used by a railroad company in the transportation of freight and passengers in connection with its railroad system is engaged in interstate commerce within the act,⁵³ as are tug boats operated in connection with the railroad system.⁵⁴

In addition to showing that the defendant is a common carrier by railroad, it must also be established that at the time of the injury it was engaged in interstate commerce. A train operated between intrastate termini, which carries cars originating beyond the state is of course engaged in interstate commerce.⁵⁵ So too an express messenger in the employ of the defendant who was charged with the duty of operating and caring for the electric light plant in the express car, was engaged in interstate commerce even in the absence of a showing that the train upon which he was serving carried interstate passengers, express or baggage, where his duties required him to pass beyond the limits of the state.⁵⁶ But the mere fact that an intrastate train was advertised to make connections with an interstate train does not make it an instrumentality of interstate commerce, where at the time of the injury it in fact carried no passengers or baggage destined beyond the state.⁵⁷ The employee of a logging road hauling logs between intrastate termini is not within the act merely because a large percentage of the logs after being manufactured into lumber were shipped outside the state.⁵⁸ A turntable is an instrumentality of interstate commerce when in use for the purpose of turning an engine which had just returned from an interstate trip prepara-

⁵² *Hammill v. Pennsylvania R. Co.*, 87 N. J. L. 388.

⁵³ *The Passaic*, 190 Fed. 644, aff'd 122 C. C. A. 466, 204 Fed. 266.

⁵⁴ *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335.

⁵⁵ *Findley v. Coal & Coke Ry. Co.*, — W. Va. —, 87 S. E. 198; *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787.

⁵⁶ *Wessler v. Great Northern Ry. Co.*, — Wash. —, 155 Pac. 1063.

⁵⁷ *Boyle v. Pennsylvania R. Co.*, 142 C. C. A. 558, 228 Fed. 266.

⁵⁸ *Nordgard v. Marysville & N. Ry. Co.*, 211 Fed. 721. See also *Bay v. Merrill & Ring Lumber Co.*, 211 Fed. 717; where a logging road was held not to be a common carrier.

tory to its being placed in a roundhouse,⁵⁹ but a car, which after completing an interstate run was unloaded and placed in the yards awaiting orders which had not been received at the time of the accident, is not an instrumentality of interstate commerce.⁶⁰

Train orders do not necessarily determine the character of the commerce in which the train is engaged. Thus, where an order directed the movement of a train between certain points in the same state, an order having been sent to the division point, under which the engine upon reaching that point was to proceed to a destination in another state for the purpose of repairs, the engineer was held to have been engaged in interstate commerce, the order being construed as not fixing the division point as the terminus of the run but merely the status of the train as an extra up to that point.⁶¹

An intermediate intrastate carrier whose entire line is confined within the limits of a single state may be engaged in interstate commerce where it carries over its lines shipments or cars originating or destined beyond the state.⁶² So also, a train operated between intrastate termini which in course of transportation necessarily passes through another state is engaged in interstate commerce.⁶³

A train engaged in an interstate run does not cease to be an instrumentality of interstate commerce until the completion of the run, hence the fact that upon arriving at its terminal it entered a side track to get out of the way of another train does not change its character as an interstate train, even though its crew, under special orders, were about to start from the terminal on a special intrastate trip.⁶⁴ An engine returning from

⁵⁹ *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353.

⁶⁰ *Moran v. Central R. Co. of New Jersey*, — N. J. L. —, 96 Atl. 1023.

⁶¹ *Chicago, R. I. & P. Ry. Co. v. Wright*, 239 U. S. 548, 60 L. ed. —, aff'g 94 Neb. 317, 96 Neb. 87.

⁶² *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 162 U. S. 184, 40 L. ed. 935.

⁶³ *Hanley v. Kansas City S. R. Co.*, 187 U. S. 617, 47 L. ed. 333.

⁶⁴ *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537. In this case an accommodation train which operated regularly between interstate termini, on arriving at its terminal at night usually backed down into the yards and remained there until the following morning when it made its

an interstate trip does not lose its status as an instrumentality of interstate commerce merely because it had been placed upon a turntable preparatory to being placed in a roundhouse.⁶⁵

The hauling of empty cars from one state to another or cars containing merely railroad property is an act of interstate commerce.⁶⁶ A train engaged in hauling water between intrastate points for the use of defendant's engines, both interstate and intrastate, has been held not to have been engaged in interstate commerce.⁶⁷ Nor is the movement of cars containing coal to chutes from which the coal was to be taken for use in both interstate and intrastate engines an act of interstate commerce.⁶⁸

The Nebraska Supreme Court has decided that where a train was made up in Nebraska destined to the Black Hills, the court would take judicial notice that the Black Hills were in South Dakota and that therefore the train and the employees thereon were engaged in interstate commerce.⁶⁹

§ 1306. Employees within the act; necessity for employment in interstate commerce. As was shown in the preceding sec-

return trip. On the day of the accident, however, the crew had special orders upon its arrival at the usual night terminal to run the train as an extra to another point in the same state and to start from there on the following morning to carry back an excursion. The train therefore upon arriving at its terminal was first taken to the station as usual and then backed down towards the yards to get on another track in order to make way for a fast train then due. The plaintiff was injured while setting switches. It was held that even if it were assumed that the special trip contemplated was not a part of an original interstate movement, the evidence showed that at the time of the accident the train had not yet completed its regular interstate run and that the placing of a train on a side track to get out of the way of the fast train was as much a

part of the interstate run as the actual crossing of the interstate line.

⁶⁵ *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353.

⁶⁶ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496; *United States v. Chicago, M. & St. P. Ry. Co.*, 149 Fed. 486; *Barker v. Kansas City, M. & O. R. Co.*, 88 Kan. 767, 43 L.R.A.(N.S.) 1221; *Kansas City Southern R. Co. v. Cook*, 100 Ark. 467; *Thompson v. Wabash R. Co.*, 262 Mo. 468.

⁶⁷ *Missouri, K. & T. Ry. Co. of Texas v. Fesmire*, — Tex. Civ. App. —, 150 S. W. 201.

⁶⁸ *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. ed. —, 11 N. C. C. A. 992, aff'g — Mo. App. —, 180 S. W. 443.

⁶⁹ *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419.

tion, to sustain a recovery under the Federal Employers' Liability Act it must be shown that the defendant was engaged in interstate commerce, but the engagement in such commerce by the employer is not of itself sufficient to show that the employee was similarly engaged. It is equally essential, therefore, to show that at the time of his injury the employee was engaged in interstate commerce,⁷⁰ and the burden is upon the plaintiff to establish that fact.^{70a}

§ 1307. **Same subject; tests.** Although the principle stated in the preceding section is clear, its application frequently involves questions of the greatest difficulty and doubt.

While the courts have laid down rules for determining the character of the employment, each case must be tested by its particular facts in the light of those rules, and even then the solution is not always free from difficulty.

The primary test, of course, is the relation of the work being performed to interstate commerce. "Is the work in question a part of the interstate commerce in which the carrier is engaged," or so closely connected therewith as to be considered part of it,⁷¹ or was the performance of the work a matter of in-

⁷⁰ *Gordon v. New Orleans G. N. R. Co.*, 135 La. 137.

A yard clerk whose duties required him to make a record of the numbers and initials on the cars, used in both intra- and interstate commerce, and to inspect and make a record of the seals on the car doors, etc., and who was killed by a train containing cars in interstate commerce, while he was walking between two tracks, was held not to have been engaged in interstate commerce, there being no evidence that deceased had been in any service connected with the interstate train, or to show what work he had been engaged in just prior to the accident, or where he was going when struck. *Pecos & N. T. Ry. Co. v. Rosenbloom*, — Tex. —, 177 S. W. 952.

A car inspector, in the employ of defendant, which was engaged in both intrastate and interstate commerce, was killed by an eastbound train while he was inspecting the cars of a westbound train, which was standing at the station where his work was performed. There was no evidence that any part of either train, or any thing or person on either train, was being moved or transported in interstate commerce. *Held*, that it could not be found that deceased was engaged in interstate commerce at the time in question. *Boyle v. Pennsylvania R. Co.*, 221 Fed. 453.

^{70a} *Hench v. Pennsylvania R. Co.*, 246 Pa. 1.

⁷¹ *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. O. A.

difference so far as interstate commerce is concerned?⁷² The actual work being performed at the time of the injury determines its character.⁷³ Applying this test, employees, whose work bears a substantial relation to interstate commerce, are within the act, although they may never pass beyond the limits of the state, and although their work may also bear a substantially equal relation to intrastate commerce.⁷⁴

The situations to which the federal act has been, or may be sought to be, applied are as diverse as the employments on the great railroad systems are varied. A train bearing a shipment destined beyond the state is engaged in interstate commerce, although the train itself does not pass beyond the state.⁷⁵

Interstate commerce by railroad cannot "be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole,"⁷⁶ hence, where the minor task upon which an employee is engaged is part of a larger one connected with interstate commerce, the employee so engaged is employed in interstate commerce.⁷⁷ Ap-

33, 197 Fed. 537; *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 58 L. ed. 1051, 10 N. C. C. A. 153, s. c. 192 Fed. 581; *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. ed. —, aff'g 214 N. Y. 413; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. ed. —, 11 N. C. C. A. 992, aff'g — Mo. App. —, 180 S. W. 443; *Southern Ry. Co. v. Peters*, — Ala. —, 69 So. 611; *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604.

⁷² *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537.

⁷³ *Chicago & E. R. Co. v. Mitchell*, — Ind. App. —, 110 N. E. 78.

The same test was adopted in *Fairchild v. Pennsylvania R. Co.*, — N. Y. App. Div. —, 155 N. Y. Supp. 751, in the following language: "The actual work being performed at the time of the injury determines its

character, and is the real test whether it is interstate or intrastate work." Quoting from *Parsons v. Delaware & H. Co.*, 167 N. Y. App. Div. 536.

⁷⁴ *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537; *Hearst v. St. Louis, I. M. & S. R. Co.*, 188 Mo. App. 36, where an engineer on a through passenger train passing from one state to another was held to be under the act although his trip ended within the state.

⁷⁵ *United States v. Colorado & N. W. Ry. Co.*, 85 C. O. A. 27, 157 Fed. 321, 15 L.R.A. (N.S.) 167.

⁷⁶ *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537.

⁷⁷ *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A.

plying this rule the courts will not inquire as to what specific portion of a train was engaged in interstate commerce where it is shown that it contains cars or shipments destined beyond the state. Accordingly it has been held that a watchman on a "dead" engine being hauled in an interstate train is within the act,⁷⁸ and the fact that a defective car causing injury to an employee was not destined beyond the state does not place him outside the protection of the act, where the car was part of an interstate train,⁷⁹ nor does the removal from an interstate train of a defective car carrying interstate commerce, and the taking of it to a point within the state for the purpose of making "heavy repairs," suspend its use as an instrumentality of interstate commerce.⁸⁰ One injured while not in the performance of any duty incident to his employment and while at the place where he was prohibited to be was not within the act.⁸¹

§ 1308. **Same subject; existence of relation of master and servant.** The Federal Employers' Liability Act is intended to regulate the liability of a common carrier by railroad and its *employees* when both are engaged in interstate commerce. Hence, to render the act applicable the relation of master and servant must be shown to have existed at the time the injury was sustained.⁸² Consequently a car repairer injured through the negligence of a railroad company other than his employer,

33, 197 Fed. 537, employee carrying materials for use in repairing bridge devoted to both classes of commerce. See also, *New York Cent. & H. River R. Co. v. Carr*, 238 U. S. 260, 59 L. ed. 1298, 9 N. C. C. A. 1, aff'd 157 N. Y. App. Div. 41, where the removal of an interstate car from an interstate train was held not to deprive employees engaged in such removal of the protection of the act.

⁷⁸ A watchman on a dead engine being hauled in train carrying interstate commerce, and which when in use was used in interstate commerce is engaged in interstate commerce. *Atlantic Coast Line R. Co.*

v. Jones, — Ala. App. —, 63 So. 693.

⁷⁹ *Kansas City Southern R. Co. v. Cook*, 100 Ark. 467.

⁸⁰ *St. Louis & S. F. Ry. Co. v. Conarty*, 106 Ark. 421, rev'd on other grounds 238 U. S. 243, 59 L. ed. 1290.

⁸¹ *Vanordstrand v. Northern Pac. Ry. Co.*, 86 Wash. 665, where a "call boy" was injured on jumping from a moving train which he had boarded to avoid the necessity of walking.

⁸² *Wagner v. Chicago & A. R. Co.*, 180 Ill. App. 196, aff'd 265 Ill. 245, which is affirmed by 239 U. S. 452, 60 L. ed. —.

and with whom the latter had no traffic arrangement is not entitled to recover under the act.⁸³ A Pullman porter paid exclusively by the Pullman Company is not an employee of a common carrier by railroad, and hence not within the act, although part of his duty was to collect tickets and turn them over to the train conductor.⁸⁴ On the other hand, a porter on a car owned jointly by the Pullman Company and a railroad, and operated by them as an association under contract, has been held to be within the act.⁸⁵

An independent contractor, as to whom the railroad company has and exercises no power of control is not within the act as the relation of master and servant does not exist between them.⁸⁶ Thus under a contract between a railroad company and the plaintiff's intestate, in which the railroad company was described as party of the first part and decedent as party of the second part and as "contractor," the covenants of the one being made the consideration for the covenants of the other, the decedent as contractor agreed, "1st. To furnish all the labor required and necessary to handle; and (a) to handle all the coal required by the company at Enid, from either open or closed cars, or both, and to place the same in coal chute pockets of the company; to gather up all coal that falls from the coal chute pockets to the ground and place the same on cars or engines as desired by the company. (b) to break all coal to the size of four inch cubes or less before delivery to chutes for engine use and to unload all coal for stationary boilers. (c) to unload wood from cars to storage piles located on company's right of way at Enid. (d) to load cinders from the right of way to cars at points designated by the company. (e) to unload sand from cars furnished by the company at points designated by it. 2nd. The company agrees to pay for the services enumerated in certain designated numbers of cents per ton, or cord or yard, as the case may be, to be paid upon estimates and records of the

⁸³ Kentucky & T. Ry. Co. v. Min-ton, 167 Ky. 516.

⁸⁴ Robinson v. Baltimore & O. R. Co., 237 U. S. 84, 59 L. ed. 849, 8 N. C. C. A. 1.

⁸⁵ Oliver v. Northern Pac. Ry. Co., 196 Fed. 432.

⁸⁶ Chicago, R. I. & P. Ry. Co. v. Bond, 240 U. S. 449, 60 L. ed. —, rev'g — Okla. —, 148 Pac. 103.

company. 3rd. Contractor agrees to maintain a sufficient supply of coal in the coal chutes and break or crack all coal to suitable sizes. 4th. Contractor expressly assumes all liability for injuries to or death of persons in his employ or loss or injury to his property, whether caused by the negligence of the company, its agents or employees, and he covenants to save the company harmless on account thereof, or for or on account of any injury to or death of any person employed by him when and while such persons may be in or about the cars, engines and tracks of the company, 'and any injury to said contractor while performing any services under this contract which might be or have been delegated to his agent or employees.' And the contractor expressly assumes all liability for injury to or death of third persons, including the employees of the company, occasioned by any of his acts, and the company shall not be liable to him in case of his death or injury while employed in the work set forth. 5th. Punctuality of performance is stipulated for. 6th. The contract to continue until terminated, as it may be by either party upon fifteen days' notice. 7th. Or upon failure of contractor to perform his duties, at the option of the company, without being liable in damages therefor, of which failure the company shall be the sole judge. 8th. The company to furnish the necessary tools for the performance of the stipulated services. 9th. It is 'agreed and understood that the contractor shall be deemed and held as the original contractor, and the railway company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished.'

"10th. The company shall keep a record of all coal delivered and shall make settlements and pay the contractor for handling the coal upon the basis of such handling, and the contractor shall make daily reports of the cars unloaded by him and shall receive, collect and deliver to the duly authorized representative of the company a ticket from each engineman, hostler or other employee, showing the number of tons of coal delivered to any engine; (11th) payment of the work to be made monthly; and (12th) the contract and all the terms and conditions, rights and obligations thereof, to inure to the heirs, administrators, execu-

tors, legal representatives, assigns and lessees of both parties, but assigning or subletting shall not be without the written consent of the company." It was held that the relation created was that of independent contractor and not that of master and servant.⁸⁷

§ 1309. Same subject; necessity for direct and substantial relation to interstate commerce. As has been pointed out, the relation of the work being performed at the time of injury to interstate commerce in which both the carrier and the employee are then engaged must be direct and substantial.⁸⁸ Although this rule was firmly established by the federal supreme court in one of the earlier cases arising under the act,⁸⁹ it has frequently been misapplied. Thus it was held by a state court that an employee wheeling coal for use in heating a repair shop where interstate cars were repaired, was engaged in interstate commerce.⁹⁰ This decision, however, was reversed by the United States Supreme Court.⁹¹

In a very recent case the Supreme Court of the United States held that an employee injured while assisting in the movement of a car of coal, owned by the carrier, from a storage track to bins, where it was to be used alike by both interstate and intrastate engines was not engaged in interstate commerce.⁹² However, in another case where a station agent whose duty it was, in part, to attend a pump house some distance from the station, to keep the tank filled with water for locomotives, was injured by machinery in the pump house, a recovery was approved by the state supreme court, and affirmed by the Supreme Court of the

⁸⁷ Chicago, R. I. & P. Ry. Co. v. Bond, 240 U. S. 449, 60 L. ed. —, rev'g — Okla. —, 148 Pac. 103.

⁸⁸ Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. —, 11 N. C. C. A. 992, aff'g — Mo. App. —, 180 S. W. 443.

⁸⁹ Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537. See also, Illinois Cent. R. Co. v. Behrens, 233 U. S.

473, 58 L. ed. 1051, 10 N. C. C. A. 153, s. c. 192 Fed. 581.

⁹⁰ Cousins v. Illinois Cent. R. Co., 126 Minn. 172, 6 N. C. C. A. 182, rev'd 241 U. S. 641, 60 L. ed. (mem. dec.).

⁹¹ 241 U. S. 641, 60 L. ed. (mem. dec.).

⁹² Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. —, 11 N. C. C. A. 992, aff'g — Mo. App. —, 180 S. W. 443; *Contra*, Southern Ry. Co. v. Peters, — Ala. —, 69

United States.⁹³ Apparently it was conceded that the plaintiff at the time of his injury was employed in interstate commerce.

One injured while hauling coal upon a platform for the purpose of coaling an interstate engine was held to have been engaged in interstate commerce.⁹⁴ Employees on a train hauling fuel for engines for use in both classes of commerce, have been held to be within the act.⁹⁵ However, to come within the rule laid down by the supreme court the interstate character of the employment in such case must necessarily be predicated upon the interstate origin of the commodity carried rather than its anticipated use. The movement of coal between intrastate points for use by another railroad in coaling both interstate and intrastate engines has been held not to involve interstate commerce.⁹⁶

An employee whose duty it was to check coal delivered to engines engaged in both interstate and intrastate commerce and make daily reports thereof, who was killed while on his way to make such report, was held to have been engaged in interstate commerce.⁹⁷ It may be said, however, that the existence of a substantial relation to interstate commerce in such a case, is, to say the least, questionable. One employed as a miner of coal in a mine owned by an interstate railroad company was not engaged in interstate commerce although the coal handled by him might subsequently be used in such commerce.⁹⁸

A machinist employed in a repair shop where instrumentalities of both interstate and intrastate commerce were repaired,

So. 611; *Kambris v. Oregon-Washington R. & Nav. Co.*, 75 Ore. 358.

⁹³ *Great Northern Ry. Co. v. Knapp*, 240 U. S. 464, 60 L. ed. —, aff'g 130 Minn. 405.

⁹⁴ *Southern Ry. Co. v. Peters*, — Ala. —, 69 So. 611. The soundness of this decision may be questioned as the employee at the time of injury was engaged in placing the coal upon the platform to coal an expected interstate train. It might be contended that such a service was merely anticipatory of engagement in interstate commerce.

⁹⁵ *Barlow v. Lehigh Val. R. Co.*, 214 N. Y. 116, aff'g 158 N. Y. App. Div. 768; *Montgomery v. Southern Pac. Co.*, 64 Ore. 597.

⁹⁶ *Barker v. Kansas City, M. & O. Ry. Co.*, 94 Kan. 176.

⁹⁷ *Chicago, R. I. & P. R. Co. v. Bond*, — Okla. —, 148 Pac. 103, rev'd 240 U. S. 449, 60 L. ed. —.

⁹⁸ *Delaware, L. & W. R. Co. v. Yurkonis*, 137 C. C. A. 23, 220 Fed. 429, aff'g 213 Fed. 537, 6 N. C. C. A. 210. Appeal dismissed 238 U. S. 439, 59 L. ed. 1397.

who at the time of his injury was engaged in changing the location of a fixture in the shop was not engaged in interstate commerce.⁹⁹

§ 1310. Same subject; instrumentalities or employees engaged in both classes of commerce. Employees engaged on instrumentalities used in both classes of commerce whose work is of such a character as to bear a substantial relation to interstate commerce are within the act.¹ Thus bridge workers on interstate roads,² tracklaborers,³ sectionmen,⁴ and yardmen⁵ are usually held to be within the protection of the act. However, the mere likelihood or possibility that an instrumentality would be used in interstate commerce is not sufficient to render it a part of such commerce.⁶

One employed to clean out ashes from an ash pit used by

⁹⁹ *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. ed. —, aff'g 214 N. Y. 413.

¹ Employees engaged in both interstate and intrastate commerce in such a way that employment in one cannot be distinguished from employment in the other are within the act. *Behrens v. Illinois Cent. R. Co.*, 192 Fed. 581, s. c. 233 U. S. 473, 58 L. ed. 1051, 10 N. C. C. A. 153.

² *Thomson v. Columbia & P. S. R. Co.*, 205 Fed. 203, 4 N. C. C. A. 925. *Contra*, *Taylor v. Southern Ry. Co.*, 178 Fed. 380.

Ironworker on bridge used in both classes of commerce struck by intrastate train is within the act. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537.

³ *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832.

Keeping tracks used in both interstate and intrastate commerce in repair is so closely connected with

interstate commerce as to be in legal contemplation part of it. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537. Employees repairing switches used by both classes of commerce are within the act. *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832.

Employee clearing snow from track is within the act. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156.

⁴ *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657; *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893.

⁵ *Johnson v. Great Northern R. Co.*, 102 C. C. A. 89, 178 Fed. 643.

⁶ The mere fact that an engine upon which a hostler was employed might be used in interstate commerce does not bring him within the act where there was no equal likelihood of its being used in intrastate commerce and it had in fact been so used upon its last run. *La Casse v. New Orleans, T. & M. R. Co.*, 135 La. 129.

both interstate and intrastate commerce, was engaged in interstate commerce.⁷

A recent Michigan case in which recovery was denied in behalf of an employee injured while engaged in cleaning snow from switches, on the ground of contributory negligence, seems to have been based upon the state law rather than the federal act.⁸ The question of the applicability of the latter does not seem to have been raised, although, if the switches were used by interstate trains, unquestionably the employee was engaged in interstate commerce.

§ 1311. **Same subject; interstate character of traffic.** The interstate character of the traffic must be determined in the light of the facts of the individual case. The ordinary case involving merely the interstate inception or destination of the traffic is free from difficulty.⁹

The presence on a train of any commodity originating or destined beyond the state fixes the status of the entire train as an instrumentality of interstate commerce,¹⁰ and the ultimate use to which a shipment is to be put cannot affect its character as interstate commerce, and hence the mere fact that a shipment from a point beyond the state is to be devoted to work of construction does not deprive it of its status as interstate commerce.¹¹

As was previously stated the operation of a train between interstate termini constitutes an engagement in interstate commerce, irrespective of the destination of the shipments carried.¹² In accordance with this rule employees on a train passing beyond the boundaries of the state are engaged in interstate commerce although as a matter of fact all of the cars on the

⁷ *Grybowski v. Erie R. Co.*, — N. J. L. —, 95 Atl. 764.

⁸ *Barnhart v. Pere Marquette R. Co.*, — Mich. —, 155 N. W. 355. The accident in this case occurred in 1912, and hence was within the period covered by the act.

⁹ See also § 1307, *ante*.

¹⁰ *United States v. Colorado & N. W. Ry. Co.*, 85 C. C. A. 27, 157 Fed.

321, 15 L.R.A.(N.S.) 167, 13 Ann. Cas. 893.

¹¹ *Kansas City, M. & O. Ry. Co. of Texas v. Pope*, — Tex. Civ. App. —, 152 S. W. 185.

¹² *United States v. Colorado & N. W. Ry. Co.*, 85 C. C. A. 27, 157 Fed. 321, 15 L.R.A.(N.S.) 167, 13 Ann. Cas. 893; *Kansas City Southern R. Co. v. Cook*, 100 Ark. 467.

train are empty.¹³ However it has been held that empty cars returned to the owner from an interstate trip, having no particular destination within the state, except to be moved from place to place to be assembled for distribution, lose their character as present instrumentalities of interstate commerce.¹⁴

A car in interstate transit does not lose its character as an instrumentality of interstate commerce while merely stopping for repairs before being turned over to a connecting carrier,¹⁵ and mere delay in moving a car to its destination does not remove it from interstate commerce.¹⁶ Evidence that some of the cars in a train bore cards indicating an interstate origin and that it was customary for such cards to indicate both the origin and destination of the same coupled with the fact that the inscription on the cars indicated that they belonged to railroads located in other states has been held sufficient to show that the train in question was transporting interstate commerce.¹⁷

A conductor of a street railroad company operating between adjacent cities situated in different states was not engaged in interstate commerce, where, at the time of his injury, he was in charge of a car which was not destined beyond the state, the only passenger thereon having a local destination.¹⁸ The fact that a train operating between intrastate termini was advertised to make connections with interstate trains does not change its character as an instrumentality of intrastate commerce, unless it actually carried passengers or baggage destined beyond the state.¹⁹ An employee engaged in distributing cars from an interstate train and clearing the track for another interstate

¹³ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496; See *Hench v. Pennsylvania R. Co.*, 246 Pa. 1, where the evidence was held insufficient to show that empty cars were engaged in interstate commerce.

¹⁴ *Pennsylvania R. Co. v. Knox*, 134 C. C. A. 426, 218 Fed. 748.

¹⁵ *Lorick v. Seaboard Air Line Ry.*, — S. C. —, 86 S. E. 675.

¹⁶ *Great Northern Ry. Co. v. Otos*, 239 U. S. 349, 60 L. ed. —, aff'g 128 Minn. 233.

¹⁷ *Mattocks v. Chicago & A. Ry. Co.*, 187 Ill. App. 529.

¹⁸ *Kiser v. Metropolitan St. R. Co.*, 188 Mo. App. 169.

¹⁹ *Boyle v. Pennsylvania R. Co.*, 142 C. C. A. 558, 228 Fed. 266.

train is within the act,²⁰ and the fact that the train which had come in, being a local train, might have dropped all cars from beyond the state is too remote a possibility to warrant the withdrawal of the case from the jury.²¹

An interstate shipment may lose its character as such and become purely intrastate where upon reaching its terminus or delivery point it is reshipped to an intrastate point.²² So where a train containing interstate shipments was destined to a point beyond which no one had authority to move it, in the absence of new orders, it was held that the interstate character of the shipment terminated at that point, and a trainman employed thereon was not engaged in interstate commerce after it had left that point pursuant to a new order directing its movement to another destination in the same state.²³ Mr. Roberts refers to this decision as close on the facts,²⁴ and so it is. However it is apparent that the train consisted solely of empty cars and hence the control of its movement was vested solely in the carrier. Such a question could not arise with respect to trains carrying commodities destined beyond the point fixed by the train orders, since no mere order affecting the movement of the train could affect the interstate character of the traffic.

To change the interstate character of the traffic there must be an actual reshipment and not a mere colorable one. Hence where a shipment is accepted for a point in another state requiring transshipment over another railroad, the carriage will be deemed continuous notwithstanding the fact that a through bill of lading was not issued and no through route had been established.²⁵ So too, a shipment may be interstate in character although transported upon a local bill of lading, where it was the intention of the parties that it should actually pass

²⁰ *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352, 60 L. ed. —, aff'g 101 S. C. 86.

²¹ *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352, 60 L. ed. —, aff'g 101 S. C. 86.

²² *Gulf, C. & S. F. Ry. Co. v. Texas*, 204 U. S. 403, 51 L. ed. 540; *Chicago, M. & St. P. Ry. Co. v.*

Iowa, 233 U. S. 334, 58 L. ed. 988.

²³ *Louisville & N. R. Co. v. Strange's Adm'x*, 156 Ky. 439.

²⁴ *Roberts' Injuries to Interstate Employees on Railroads*, 139.

²⁵ *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. ed. 1055.

beyond the state without breaking the continuity of carriage except as rendered necessary for transshipment.²⁶ The fact that the bill of lading was executed in the state in which a shipment originated and to which it was destined does not interfere with its character as interstate commerce where there was in fact an actual movement between states.²⁷

Interstate transportation is not ended merely because of the arrival of the train at its terminal, where the cars were to be distributed.²⁸

§ 1312. **Same subject; trains operated between intrastate termini.** Where a train carries shipments or cars originating or destined beyond the state, the employees thereon are engaged in interstate commerce although it operates only between intrastate termini.²⁹ Thus a freight conductor, operating a train carrying interstate commerce between intrastate termini, injured while engaged in making out his reports showing the number and causes of his delays covering the entire round trip, was held to be within the act.³⁰ So also an intrastate shipment may constitute interstate commerce where in the course of its transportation it is carried through another state,³¹ hence an employee injured while employed on a train which passed

²⁶ Railroad Commission of Louisiana v. Texas & P. R. Co., 229 U. S. 336, 57 L. ed. 1215, where a shipment originating in Louisiana was directed to a broker in New Orleans for exportation to a foreign country.

²⁷ Pecos & N. T. Ry. Co. v. Stinson, — Tex. Civ. App. —, 181 S. W. 526, where cattle destined to a point in Texas were driven from Texas across the boundary to New Mexico and actually loaded on cars across the state line in New Mexico, the bill of lading being executed in Texas.

²⁸ St. Louis, S. F. & T. Ry. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S. W. 1099.

²⁹ Northern Pac. Ry. Co. v. Washington ex rel. Atkinson, 222 U. S. 370, 56 L. ed. 237, rev'g 53 Wash. 673; United States v. Colorado & N. W. Ry. Co., 85 C. C. A. 27, 157 Fed. 321, 15 L.R.A.(N.S.) 167; United States v. Chicago, M. & P. S. Ry. Co., 197 Fed. 624; Nashville, C. & St. L. R. Co. v. Banks, 156 Ky. 609. See also, § 1305, *ante*.

³⁰ Peery v. Illinois Cent. R. Co., 123 Minn. 264, s. c. 128 Minn. 119.

³¹ Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617, 47 L. ed. 333; Louisville & N. Ry. Co. v. Allen, 152 Ky. 145, s. c. 152 Ky. 837; Deardorff v. Chicago, B. & Q. Ry. Co., — Mo. —, 172 S. W. 333.

through another state en route to an intrastate terminus was engaged in interstate commerce.³²

§ 1313. Same subject; injury while not actively employed. Many questions of interest arise in connection with cases where the employee was injured at a time when not actually engaged in the performance of his duties. Of course the question of suspension of employment arising from the temporary cessation of actual work may be settled under the well recognized principles of the law of master and servant. On this question Mr. Labatt says:

"It is not necessary to show, as a condition precedent to recovery, that he [the servant] was on duty when the injury was received. In so far as his rights are dependent upon the position which he was occupying at the time of the event complained of, a good cause of action is made out as soon as it is proved that, although he may not have been actively engaged in the performance of any duty, the position in question was one which he was authorized to occupy. This rule enures to the servant's advantage where the matters upon which he was engaged were not immediately connected with the actual performance of the work undertaken by him, and even where those matters were of a merely personal and private nature."³³

While common-law rules as to the effect of a temporary cessation of work upon the continuity of the relation of master and servant, and the obligations thereunder may be applied purely for the purpose of fixing the status of the injured employee, they cannot be relied upon exclusively for the purpose of determining the question of the application of the Federal Employers' Lia-

³² *Baltimore & O. Ry. Co. v. Darr*, 124 C. C. A. 565, 204 Fed. 751, aff'g 197 Fed. 665.

³³ 4 *Labatt's Master and Servant*, § 1558; *Powell v. Freeman*, 105 Tex. 317, where a brakeman falling into a pit while looking for a tool boy to get a tin cup for a way car of an interstate train was held to have been within the act.

See also exhaustive annotation

upon when the relation of master and servant exists, considered with reference to time and place, and the right of a workman to compensation for injuries incurred at such time and place, 4 N. C. C. A. 110. While this annotation is devoted primarily to the right to compensation under workmen's compensation acts, the underlying principles are the same.

bility Act, for there is still another question which must be answered; viz., the relation to interstate commerce. Can it be said that an employee who is not engaged in actual performance of his duties is employed in interstate commerce?

The logical answer would seem to be that where the cessation of activity was not such as to suspend or terminate the relation of master and servant, the character of the employment should partake of the nature of the work temporarily suspended. In other words, a servant engaged in interstate commerce, who, without terminating or suspending the relation of master and servant, ceases work temporarily, continues to be engaged in interstate commerce, although not actively employed in such commerce. It is believed that an analysis of the decisions will bear out this conclusion. Thus the supreme court has held that an employee about to make a brief visit to a boarding house after having assumed his duties and while waiting to engage in an interstate trip is employed in interstate commerce.³⁴ There, obviously, the work temporarily suspended involved interstate commerce and the court properly held that the cessation of active duties in connection with it did not change the nature of the employment. Similarly it was held in another case that an employee returning on a pass from a trip on which he was engaged in interstate commerce, to take out another interstate train, was engaged in interstate commerce.³⁵ So also an employee, traveling "deadhead" upon the expiration of his period of service under the Sixteen Hour Law, who at the request of the conductor, who was disabled, performed services for the company which were useful and necessary at the time and under the circumstances is not to be regarded as a mere volunteer or as a stranger who had been employed for the occasion by the conductor.³⁶

A brief absence from the scene of work or instrumentality which is not inconsistent with the employee's duty to his em-

³⁴ North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496.

v. Brothers, — Tex. Civ. App. —, 165 S. W. 488.

³⁶ Seaboard Air Line Ry. v. Mc-

³⁵ St. Louis Southwestern Ry. Co. Michael, 143 Ga. 689.

ployer does not necessarily preclude his claim to be still on duty and engaged in interstate commerce; neither the period or nature or continuity of service is changed by such a stepping aside from or cessation of activity. Thus, the visiting of a wayside place for a lunch or other legitimate and common means of refreshment or waiting for further orders after the performance of the task in hand, the employee at all times being within customary reach for continuance of the day's service and holding himself in readiness immediately to respond, does not change the character of his employment. Accordingly, it has been held that a workman, who, upon arriving at a terminal transfer point on a train engaged in interstate commerce upon the completion of his train work, proceeded to a nearby saloon, off the right of way, to get a drink, and who was injured upon his return to the railroad premises in search of the conductor to receive further instructions was engaged in interstate commerce. The court saying: "Work in the transfer yard was indispensable to the interstate business. Respondent had not been relieved for the day. His service from the time he started out in the morning until the instant of his injury and the work he then thought might be required of him, were inseparably connected with interstate business and, so, were a part thereof. The court, under the circumstances, would not have made any mistake by so deciding, as matter of law."³⁷ So too an employee was nevertheless within the act although waiting to chock the wheels of cars being placed in a coal chute.³⁸ The mere fact that at the time of the injury an employee had ceased his activities to get out of the way of a train does not remove him from the protection of the act.³⁹

A section foreman, whose duty it was to keep in repair switches in defendant's yard which were used for breaking up, temporary storage, and making up of trains which were devoted to intrastate as well as interstate commerce and who was killed by a train in the yard as he was crossing the track after having repaired some switches and while going to another

³⁷ Graber v. Duluth, S. S. & A. R. Co., 159 Wis. 414.

³⁸ Kamboris v. Oregon-Washing-

ton R. & Nav. Co., 75 Ore. 358.

³⁹ Glunt v. Pennsylvania R. Co., 249 Pa. 522.

point in the yard, where or for what purpose not being disclosed, was held to have been engaged in interstate commerce.⁴⁰

An employee on the master's premises, while on his way to work, where he would have engaged in interstate commerce has been held to be within the act⁴¹ and a similar rule has been applied to sectionmen returning from work on a hand car.⁴²

A laborer, knocked from a trestle while on his way to defendant's boarding quarters where he intended to spend the night, was held to have been engaged in interstate commerce at the time of his death. In this case, it appeared that decedent had been engaged in repairing and rebuilding a trestle on defendant's interstate road. The boarding cars, at which defendant's employees stayed at night were located about a mile from the trestle. In going to and from their work, they frequently used hand cars but on the day in question, because of obstructions on the tracks they were directed by their foreman to walk and in doing so were compelled to cross a trestle. In affirming a judgment below for the plaintiff, the court said: "At the time of his death he was either an employee engaged in interstate commerce or he was a mere licensee using the tracks of the company in going from his place of work to the boarding car. It is clear that while actually engaged at work for the company he was an employee engaged in interstate commerce, and we think it equally clear that the moment his day's work ended he was not thereby converted into some other kind of an employee, but that he retained his character as an interstate employee, or became, when his work ended, and while going to the boarding car under the circumstances stated, a licensee. After giving to this question careful consideration our opinion is that in going from his place of work to his boarding car he continued in the character of an employee of the company, engaged in interstate commerce. The boarding cars in which he took his meals and re-

⁴⁰ *Willever v. Delaware, L. & W. Co.*, 87 N. J. L. 348. —, 162 S. W. 959.

⁴² *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870.

⁴¹ *Missouri, K. & T. Ry. Co. of Texas v. Rentz*, — Tex. Civ. App.

mained at night were owned by the company. They were carried about by the company from one state to another and from place to place for the convenience and accommodation of its employees, and at the time in question were standing on the tracks of the company. The employees were not only invited to, but were, in a measure, obliged by the company to use these boarding cars, and the only convenient and practicable way to go to and from the cars and the place of work was on the track of the company where Walker was when he was knocked off. * * * And so we think that under these circumstances an employee such as Walker was should be treated as engaged in interstate commerce, not only when actually employed at his work, but while using the premises of the company in going to and from the place set apart for him to eat and sleep and his work on the premises of the employer. In other words, within the contemplation of the act, the course of his employment covered, not only the time he was actually engaged at work, but the time he was engaged in going to and from his work.”⁴³

A section foreman, who while on his way to his home station on a hand car was injured while helping to lift the car from the track, was held to be within the act. The train which inflicted the injury was engaged in interstate commerce. The court saying: “The return trip to Loraine, his headquarters, was as much an incident and a part of the work of repairing the broken rail as was the outgoing trip to perform that service. We are of the opinion that the act of removing the car from the track out of the way of the coming train, being in the aid of the movement of interstate commerce, was sufficient of itself to bring the accident within the operation of the Federal Employers’ Liability Act.”⁴⁴

In another case a rather extended application of the rule was made where a repairman sleeping in a bunk car was held to be within the act.⁴⁵

The relation has been held to continue for a reasonable period after the termination of an interstate trip to enable the

⁴³ Louisville & N. R. Co. v. Walker’s Adm’r, 162 Ky. 209.

Tex. Civ. App. —, 177 S. W. 1185.

⁴⁴ Texas & P. Ry. Co. v. White, —

⁴⁵ Sanders v. Charleston & W. C. R. Co., 97 S. C. 50.

employee to wash and change his soiled clothes, in the caboose provided with conveniences therefor, before going to his lodging house.⁴⁶ An engineer, who fell into a pit in defendant's round-house in the early morning hours while apparently in search of his engine, was held to be within the act.⁴⁷

An engineer testing an engine preparatory to an interstate run is within the act.⁴⁸ On the other hand it has been held that a train dispatcher directing the movement of both classes of commerce was not engaged in interstate commerce, during moments of leisure, while awaiting the arrival of a train.⁴⁹ This decision, however, is of doubtful authority.

§ 1314. Same subject; negligent fellow-servant need not be engaged in interstate commerce. It is not essential that a fellow-servant whose negligence resulted in injury should have been engaged in interstate commerce if the injured employee was so engaged,⁵⁰ and the converse is also true. Hence the mere fact that the negligent fellow-servant was engaged in interstate commerce does not of itself bring the injured employee within the act. Thus recovery cannot be had under the act for injury to an employee engaged solely in intrastate commerce merely because the train inflicting the injury was engaged in interstate commerce.⁵¹

⁴⁶ *Easter v. Virginian Ry. Co.*, — W. Va. —, 86 S. E. 37.

⁴⁷ *In Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

⁴⁸ *Lloyd v. Southern R. Co.*, 166 N. C. 24, 7 N. C. C. A. 520, aff'd 239 U. S. 496, 60 L. ed. —.

⁴⁹ *In Gray v. Chicago & N. W. R. Co.*, 153 Wis. 637, it was held that a train dispatcher employed in dispatching trains engaged in both classes of commerce was not engaged in interstate commerce during intervals of leisure or rest while merely awaiting the arrival of an engine. This decision was affirmed by the United States Supreme Court in 237 U. S. 399, 59 L. ed. 1018, 9 N. C. C. A. 452, the court refusing

to review the action of the court below in excluding evidence that the employee was engaged in interstate commerce on the ground that since defendant's liability was substantially the same under either the state law or the federal act, the error, if any, was not prejudicial.

⁵⁰ *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537.

⁵¹ Employee on engine hauling merely a caboose on an intrastate trip who was struck by an interstate train while crossing the track to receive orders is not engaged in interstate commerce. *McAuliffe v. New York Cent. & H. River R. Co.*, 164 N. Y. App. Div. 846.

It has been held by the United States Circuit Court of Appeals that an allegation that both deceased, who was struck by an engine while at work near the track, and the defendant were engaged in interstate commerce at the time of the accident was insufficient, without an allegation showing that the engine which struck the deceased was also engaged in interstate commerce at that time.⁵² This decision, however, is clearly erroneous as it is directly in conflict with the decisions of the Supreme Court of the United States.⁵³

Where the injured employee was engaged in interstate commerce, the fact that at the time of the injury his negligent fellow-employees were moving a push car loaded with material which defendant found it could not use and which they were taking to their homes after the day's work, the defendant was held liable.⁵⁴

§ 1315. Same subject; preparation of instrumentalities for use. The distinction between the preparing of an instrumentality for use and its actual use is well defined in a recent case. The court after assuming the correctness of the proposition that a car which has been used, and may again be used indiscriminately in both intrastate and interstate commerce is an instrumentality of interstate commerce, says: "There is a distinction between employment in preparing an instrument of commerce for use, and employment in using such an instrument in commerce. Preparation of an instrument for use in commerce of both kinds necessarily means preparation for use in commerce of either kind, and as one kind is interstate commerce, it follows logically that such preparation is for use in interstate commerce; but employment connected with the actual use of

A conductor upon an intrastate car injured in a collision with an interstate car was not engaged in interstate commerce, and the fact that it was his duty to place his car upon a switch so as to permit of the passage of the interstate car does not alter the case. *Miller v. Kansas City Western Ry. Co.*, — Mo. App. —, 168 S. W. 336.

⁵² *Illinois Cent. R. Co. v. Rogers*, 136 C. C. A. 530, 221 Fed. 52.

⁵³ *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, Ann. Cas. 1914C 153n, rev'g 117 C. C. A. 33, 197 Fed. 537.

⁵⁴ *Louisville & N. R. Co. v. Walker's Adm'r*, 162 Ky. 209.

such an instrument is a part of intrastate or interstate commerce according as the instrument is in use in commerce of one kind or the other." The court accordingly held that the preparation for continued use of an instrumentality then in actual use in intrastate commerce was not within the act.⁵⁵ It need hardly be said that employees preparing an interstate train for movement are within the act.⁵⁶ Thus a porter injured while carrying ice for a water cooler on an interstate train,⁵⁷ and an engineer testing his engine preparatory to an interstate run⁵⁸ have been held to be within the act.

One employed as a general worker about a railroad yard, who was firing an engine preparatory to its hauling an interstate train, and who was injured while assisting to move the engine to a place in the yard where a barrel of oil would be taken on, to be carried on the trip, prior to the arrival of the engineer, was held to have been engaged in interstate commerce.⁵⁹

It must be borne in mind, however, that the work of preparation must have a direct and substantial relation to interstate commerce, and not a mere anticipated or remote connection growing out of the general transaction of railroad business and equally applicable to all classes of commerce. The failure to apply this rule renders erroneous many of the earlier decisions. To illustrate: An employee taking coal from a chute and placing it in the tender of an engine employed in interstate commerce is properly held to have been engaged in such commerce,⁶⁰ while the employee who placed the coal in the chute, from which it was to be taken to coal engines engaged in both classes of

⁵⁵ *Boyle v. Pennsylvania R. Co.*, 142 C. C. A. 558, 228 Fed. 266.

⁵⁶ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, Ann. Cas. 1914C 159, rev'g 156 N. C. 496; *Bramlett v. Southern Ry. Co.*, 98 S. C. 319; *Neil v. Idaho & W. N. R. Co.*, 22 Idaho 74; *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419.

⁵⁷ *Freeman v. Powell*, — Tex. Civ. App. —, 144 S. W. 1033.

⁵⁸ *Lloyd v. Southern Ry. Co.*, 166 N. C. 24, 7 N. C. C. A. 520, aff'd 239 U. S. 496, 60 L. ed. —.

⁵⁹ *Tonsellito v. New York Cent. & H. River R. Co.*, 87 N. J. L. 651.

⁶⁰ *Armbruster v. Chicago, R. I. & P. Ry. Co.*, 166 Iowa 155.

commerce, was not, while so engaged, employed in interstate commerce.⁶¹

Prior to the decision of the supreme court in the Harrington case⁶² it had been held that employees engaged in placing coal in chutes for the use of interstate and intrastate trains, were employed in interstate commerce.⁶³

§ 1316. **Same subject; employees of electric railways.**⁶⁴ A motorman on an interstate electric car has been held to be within the act.⁶⁵ A lineman, employed by an electric railroad company operating wholly within the boundaries of a state was held to be engaged in interstate commerce where it was shown that by means of connections with other lines of railway more than eight per cent. of its business was of an interstate character and the decedent at the time of the accident was engaged in placing cross-arms on a line of poles in connection with an automatic signal device used by the railroad.⁶⁶

§ 1317. **Same subject; employees engaged in construction work.** The courts are quite in harmony in holding that employees engaged in initial construction work are not within the act,⁶⁷ and there is dictum to that effect in a

⁶¹ *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. ed. —, 11 N. C. C. A. 992, aff'g — Mo. App. —, 180 S. W. 443. But see *Great Northern Ry. Co. v. Knapp*, 240 U. S. 464, 60 L. ed. —, aff'g 130 Minn. 405.

⁶² *Supra*.

⁶³ *Kamboris v. Oregon-Washington R. & Nav. Co.*, 75 Ore. 358; *Southern Ry. Co. v. Peters*, — Ala. —, 69 So. 611.

⁶⁴ See also, § 1305, *supra*.

⁶⁵ *South Covington & C. St. R. Co. v. Finan's Adm'x*, 153 Ky. 340; *McAdow v. Kansas City Western Ry. Co.* (Mo. App.), 164 S. W. 188, aff'd 240 U. S. 51, 60 L. ed. —.

⁶⁶ *Ross v. Sheldon*, — Iowa —, 154 N. W. 499.

⁶⁷ One employed in the construction of a tunnel, which was intended

to be utilized for the purpose of defendant's interstate traffic when completed, was held not to be employed in interstate commerce, because the tunnel had not been and was not being used in, or in connection with, interstate commerce. *Jackson v. Chicago, M. & St. P. Ry. Co.*, 210 Fed. 495.

Where one was at work in the construction of a railroad bridge some 600 feet distant from the railroad, and which was to form part of a cut-off, which had not been provided with rails or used as a railroad, it was held that he was not engaged in interstate commerce, although when the cut-off should be completed it was intended to use it in interstate commerce. *Bravis v. Chicago, M. & St. P. R. Co.*, 133 C. C. A. 228, 217 Fed. 234.

decision of the supreme court.⁶⁸ The reason, of course, is that instrumentalities in course of construction, whether cars, engines, tracks, roadbeds, or bridges, have but a potential connection with interstate commerce. But care must be taken to distinguish between initial construction, and construction in the nature of repairs, upkeep, maintenance or operation of a road already in use in interstate commerce. Thus signal construction men have been held to be within the act,⁶⁹ as, also, have employees engaged in tearing down and removing the debris of a roundhouse, which had been destroyed, by fire, to permit of its being rebuilt.⁷⁰ Employees engaged in the erection of an extension or an addition to a building already in use in interstate commerce are not engaged in construction work and hence are within the act,⁷¹ as are employees engaged in building a new office in a freight shed already used in interstate commerce.⁷²

Employee engaged in constructing double track which had never been used for traffic is not within the act. *Chicago & E. R. Co. v. Steele*, — Ind. —, 108 N. E. 4.

⁶⁸ *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537.

⁶⁹ *Ross v. Sheldon*, — Iowa —, 154 N. W. 499; *Grow v. Oregon Short Line R. Co.*, 44 Utah 160.

One employed in installing a block system on track used in interstate commerce is within the act. *Saunders v. Southern Ry. Co.*, 167 N. C. 375.

In *Glunt v. Pennsylvania R. Co.*, 249 Pa. 522, it appeared that the plaintiff was employed in drilling holes through the rails of defendant's interstate railroad so that they could be bonded for the purpose of installing a signal system, and while so engaged was injured. It was contended that plaintiff was not employed on any instrumentality used in interstate commerce, and

that, therefore, the Federal Employers' Liability Act did not apply. In holding that the plaintiff was engaged in interstate commerce, the court said: "It is true the signal system at this time was not in operation, but the rail in which the holes were being drilled was part of the roadbed, which at the time of the injury was used in interstate commerce. The rail was to be utilized in connection with the new signal system, but it also entered into and formed a part of the roadbed. The fact that ultimately this rail's use was to be enlarged and its efficiency made greater did not deprive it of being used as an instrumentality in interstate commerce at that time."

⁷⁰ *Thomas v. Boston & M. R. R.*, 134 C. C. A. 554, 219 Fed. 180, 8 N. C. C. A. 981.

⁷¹ *Thompson v. Cincinnati, N. O. & T. P. R. Co.*, 165 Ky. 256.

⁷² *Eng v. Southern Pac. Co.*, 210 Fed. 92.

It is obvious that construction work of this character is merely incidental to the operation of the road, and in no sense work of initial construction.

The question as to whether work was construction work or repair and maintenance is sometimes difficult of solution but the trend of decisions seems to favor a construction in favor of repairs rather than work of construction.⁷³ An employee of a railroad company who was killed while removing trash and drift so that a trestle could be erected for temporary use as a bridge for the passage of trains across a river, and to be used later as false works for rebuilding an old bridge, the partial destruction of which necessitated the building of the trestle, was held to have been engaged in interstate commerce, where it was admitted that the old bridge was used for interstate traffic, and the trestle was intended for similar use.⁷⁴ A train master in charge of construction work on a new track was held to be within the act although the track had not been placed in general service where it was shown that on two occasions prior to the accident it had been used for interstate trains.⁷⁵

§ 1318. Same subject; repairs and maintenance.⁷⁶ Repairmen⁷⁷ if shown to have been engaged on instrumentalities of interstate commerce⁷⁸ are within the protection of the act.

⁷³ *Ross v. Sheldon*, — Iowa —, 154 N. W. 499.

⁷⁴ *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604.

⁷⁵ *Clark v. Chicago Great Western R. Co.*, 170 Iowa 452.

⁷⁶ See also, § 1310, *supra*.

⁷⁷ Hostler preparing engine for interstate trip is within the act. *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa 155.

Boilermaker repairing an engine which had been used and was destined for use in interstate commerce is within the act. *Law v. Illinois Cent. R. Co.*, 126 C. C. A. 27, 208 Fed. 869.

Repairman working on locomotive used in interstate commerce is within the act. *Winters v. Minneapolis*

& St. L. R. Co., 126 Minn. 260.

Repairman working on car used indiscriminately in both inter and intrastate commerce is within the act. *Missouri, K. & T. R. Co. v. Denahy*, — Tex. Civ. App. —, 165 S. W. 529.

Repairman working on car which belonged to another road and which had just completed an interstate journey is engaged in interstate commerce. *Gaines v. Detroit, G. H. & M. R. Co.*, 181 Mich. 376.

Repairman making temporary repairs on engine used in interstate commerce is within the act. *Baltimore & O. R. Co. v. Darr*, 124 C. C. A. 565, 204 Fed. 751, *aff'd* 197 Fed. 665.

⁷⁸ A boilermaker injured while re-

This rule has been applied to laborers repairing tracks used in both classes of commerce;⁷⁹ to sectionmen clearing away wrecks;⁸⁰ to laborers, removing earth from the roadbed in the course of repair and maintenance;⁸¹ and to a section foreman, taking out rails from the main track and replacing them with others, the old rails being placed upon a flat car standing upon a track employed in both classes of traffic.⁸²

It has been held that a track laborer injured while loading old rails, which had been replaced by new ones, on a flat car for the purpose of storing them elsewhere, or possibly selling them as scrap iron, was not engaged in interstate commerce.⁸³ The United States Circuit Court of Appeals, upon similar facts, reached a different and more logical conclusion. There, also, the plaintiff was injured while removing from between the tracks old rails which had been replaced by new ones. In holding that the work was connected with interstate commerce the court said: "The work of which the plaintiff's was a part, was the repair of the roadbed by replacing old rails with new ones. The work of removing old rails was not complete when they were lifted from their place upon the ties and tossed upon

pairing the boiler constituting part of a wrecking train which when in use was subject to call to different states is not engaged in interstate commerce. *Ruck v. Chicago, M. & St. P. R. Co.*, 153 Wis. 158.

Machinist in shop used for repair of both inter- and intrastate engines, injured while removing a shaft hanger from a girder in the shop is not within the act. *Shanks v. Delaware, L. & W. R. Co.*, 163 N. Y. App. Div. 565, *aff'd* 239 U. S. 556, 60 L. ed. —.

⁷⁹ An employee injured by the fall of a rail which he was carrying to replace an old rail in a track used by interstate trains is within the act. *Cincinnati, N. O. & T. P. Ry. Co. v. Tucker*, 168 Ky. 144; *Truesdell v. Chesapeake & O. Ry. Co.*, 159 Ky. 718.

A laborer in a track gang, engaged in repairing a track located wholly within the local state, but used by defendant for the transportation of both intrastate and interstate freight and passengers, was employed in interstate commerce. *Lombardo v. Boston & M. R. R.*, 223 Fed. 427.

⁸⁰ A section man injured while clearing up a wreck and repairing a track used in interstate commerce is within the act. *Missouri, K. & T. Ry. Co. of Texas v. Mooney*, — Tex. Civ. App. —, 181 S. W. 543.

⁸¹ *Tralich v. Chicago, M. & St. P. R. Co.*, 217 Fed. 675.

⁸² *Cherpeski v. Great Northern Ry. Co.*, 128 Minn. 360.

⁸³ *Illinois Cent. R. Co. v. Kelly*, 167 Ky. 745.

the roadbed, but was complete only when they were carried away from the place where they lay between the tracks. The removal of the old rails was as much a part of the repair work as the bringing of new rails to the place to be repaired.”⁸⁴

An engineer on a train hauling gravel for the purpose of repairing or improving the roadbed on an interstate road is engaged in interstate commerce⁸⁵ as is a machinist struck by a train engaged in switching both interstate and intrastate commerce while on his way to repair an engine engaged in interstate commerce.⁸⁶ Taking an engine from one state to another for the purpose of repairs is an act of interstate commerce.⁸⁷

§ 1319. Same subject; movement of cars, switching, coupling, etc. The fact that interstate cars had not yet been coupled to the train is of no significance where they were to be moved, and the train was then awaiting their attachment.⁸⁸

Switching crews when engaged upon interstate cars or trains are within the act,⁸⁹ but the proof must show employment in

⁸⁴ Philadelphia, B. & W. R. Co. v. McConnell, 142 C. C. A. 555, 228 Fed. 263.

⁸⁵ Holmberg v. Lake Shore & M. S. Ry. Co., — Mich. —, 155 N. W. 504.

⁸⁶ Staley v. Illinois Cent. R. Co., 268 Ill. 356.

⁸⁷ Chicago, R. I. & P. Ry. Co. v. Wright, 239 U. S. 548, 60 L. ed. —, aff'g 96 Neb. 87.

⁸⁸ North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496.

Where an employee was injured while coupling an engine to a baggage car which did not appear to be then engaged in interstate commerce, the fact that interstate cars were to be immediately attached thereto as part of a mixed train did not bring him within the act. Atchison, T. & S. F. Ry. Co. v. Pitts, 44 Okla. 604, 9 N. C. C. A. 545. The holding in this case would

seem to be in conflict with the decision of the supreme court in North Carolina R. Co. v. Zachary, *supra*.

⁸⁹ Moliter v. Wabash R. Co., 180 Mo. App. 84; Nashville, C. & St. L. R. Co. v. Banks, 156 Ky. 609; Southern R. Co. v. Jacobs, 116 Va. 189, aff'd 241 U. S. 229, 60 L. ed. —; Thornbro v. Kansas City, M. & O. R. Co., 91 Kan. 684; Oberlin v. Oregon-Washington R. & Nav. Co., 71 Ore. 177; Pittsburgh, C., C. & St. L. Ry. Co. v. Glinn, 135 C. C. A. 46, 219 Fed. 148; Vandalia R. Co. v. Holland, — Ind. —, 108 N. E. 580; Walsh v. Lake Shore & M. S. Ry. Co., 185 Mich. 177; St. Louis Southwestern Ry. Co. v. Anderson, 117 Ark. 41; Southern Ry. Co. v. Gadd, 125 C. C. A. 21, 207 Fed. 277, aff'd 233 U. S. 572, 58 L. ed. 1099; Kansas City, M. & O. Ry. Co. of Texas v. Pope, — Tex. Civ. App. —, 152 S. W. 185; Barlow v. Lehigh Val. R. Co., 214 N. Y. 116, aff'g 158 App.

interstate commerce⁹⁰ and the particular service upon which they are then engaged must relate to interstate commerce;⁹¹ mere anticipated service affecting interstate commerce will not suffice. But the mere fact that at the time of his injury a switchman was employed about an intrastate car being detached from or added to an interstate train does not place him without the act.⁹² The removal of empty cars from a private side track to permit of the placing of loaded interstate cars thereon presents a question for the jury as to whether an employee engaged in such removal was engaged in interstate commerce.⁹³ An employee engaged in "breaking-up" a train which had carried interstate baggage was not within the act, the baggage having been removed from the train and the decedent's employment being merely preparatory to the making up of another train with the empty cars.⁹⁴ The work of taking a "bad-order" car from an interstate train is part of interstate commerce.⁹⁵

Div. 768; *Montgomery v. Southern Pac. Co.*, 64 Ore. 597; *Otos v. Great Northern Ry. Co.*, 128 Minn. 283, aff'd 239 U. S. 349, 60 L. ed. —; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379; *Hall v. Vandalia R. Co.*, 169 Ill. App. 12; *St. Louis Southwestern R. Co. v. Anderson*, 117 Ark. 41; *Devine v. Chicago, R. I. & P. Ry. Co.*, 185 Ill. App. 488, aff'd 266 Ill. 248, which is affirmed by 239 U. S. 52, 60 L. ed. —; *Atlantic Coast Line R. Co. v. Reaves*, 125 C. C. A. 599, 208 Fed. 141.

An employee injured while engaged in switching cars preparatory to returning them to their points of origin in other states was within the act. *Bruckshaw v. Chicago, R. I. & P. Ry. Co.*, — Iowa —, 155 N. W. 273.

⁹⁰ *Norton v. Erie R. Co.*, 163 N. Y. App. Div. 466; *Knowles v. New York, N. H. & H. R. Co.*, 164 N. Y. App. Div. 711.

⁹¹ *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 58 L. ed. 1051, 10

N. C. O. A. 153, s. c. 192 Fed. 581; *Erie R. Co. v. Welsh*, 89 Ohio St. 81; *Norton v. Erie R. Co.*, 163 N. Y. App. Div. 466.

⁹² *New York Cent. & H. River R. Co. v. Carr*, 238 U. S. 260, 59 L. ed. 1298, 9 N. C. C. A. 1, aff'g 157 N. Y. App. Div. 941; *Crandall v. Chicago Great Western R. Co.*, 127 Minn. 498; *Southern R. Co. v. Jacobs*, 116 Va. 189, aff'd 241 U. S. 229, 60 L. ed. —. *Contra*, *Brakeman detaching intrastate car from interstate train not within the act. Van Brimmer v. Texas & P. Ry. Co.*, 190 Fed. 394.

⁹³ *Pennsylvania Co. v. Donat*, 239 U. S. 50, 60 L. ed. —, aff'g 139 C. C. A. 665, 224 Fed. 1021. A writ of error in this case was held frivolous. *Contra*, *Louisville & N. R. Co. v. Parker's Adm'r*, 165 Ky. 658.

⁹⁴ *Fairchild v. Pennsylvania R. Co.*, — App. Div. —, 155 N. Y. Supp. 751.

⁹⁵ *Sears v. Atlantic Coast Line R. Co.*, 169 N. C. 446.

A car inspector who was injured while disconnecting the steam hose between the engine and cars of an interstate passenger train, in order to uncouple the engine from the cars so that another engine could be substituted, when the train would continue its run, was held to have been engaged in interstate commerce at the time.⁹⁶

It has been held that a trainman injured while engaged in coupling an engine to a baggage car, was not within the act where there was no evidence that the engine and baggage car were going beyond the state and ordinarily did not do so, notwithstanding the fact that some of the cars in the train had come from or were destined beyond the state.⁹⁷ This decision is unquestionably erroneous involving as it does an analysis of each particular element of an entire instrumentality of interstate commerce. The fact that interstate cars were included in the train rendered the entire train engaged in interstate commerce and to hold that an employee was not within the act merely because the particular car which inflicted the injury was engaged in intrastate commerce is to say the least anomalous.⁹⁸

An intermediate state court has held that a freight conductor in charge of a locomotive, tender and caboose, who was killed by an interstate train while he was crossing the track at the station at which his train had stopped while on his way to report the arrival of his train was not engaged in interstate commerce.⁹⁹

§ 1320. Same subject; employees engaged in transportation by water. The question as to whether a railroad company also engaged in transportation by water is within the act is discussed in another section.¹ An employee, injured while unloading a vessel owned by a railroad but which was not operated in connection with same or as part of defendant's system was not within the act.² A deck hand on a tug boat operated in

⁹⁶ *Kansas City Southern R. Co. v. Miller*, 117 Ark. 396.

⁹⁷ *Atchison, T. & S. F. Ry. Co. v. Pitts*, 44 Okla. 604, 9 N. C. C. A. 545.

⁹⁸ *New York Cent. & H. River R. Co. v. Carr*, 238 U. S. 260, 59 L. ed.

1298, 9 N. C. C. A. 1, aff'g 157 N. Y. App. Div. 941.

⁹⁹ *McAuliffe v. New York Cent. & H. River R. Co.*, 164 N. Y. App. Div. 846.

¹ See § 1305, *supra*.

² *Jensen v. Southern Pac. Co.*,

connection with the railroad system, who was injured as the tub was tying up to its home dock preparatory to moving a barge to another state, was engaged in interstate commerce.³

§ 1321. **Same subject; miscellaneous employees.** Yard clerks inspecting trains containing interstate shipments,⁴ employees engaged in loading freight on cars for interstate transportation,⁵ employees engaged in examining and making a record of seals on interstate cars,⁶ a yard clerk, whose duty required him to make a record of all cars entering the yard, both interstate and intrastate, who was killed while in the performance of his duty,⁷ and linemen employed upon a railroad engaged in both interstate and intrastate commerce⁸ have been held to be within the act. So also a signal man charged with the duty of keeping electric signals used in controlling the operation of both interstate and intrastate trains is within the act where injured while engaged in the line of his employment,⁹ and an employee engaged in repairing a telegraph line which was used by defendant for the purpose of directing the operation of its trains in interstate commerce, has been held to be within the act.¹⁰ One employed in repairing an electrical apparatus on a bridge over defendant's railroad was held to be within the act.¹¹

A car inspector, who was injured while endeavoring to raise a wrecked car which obstructed tracks over which interstate commerce was carried, was held to have been within the act although his efforts were primarily for the purpose of liberating

215 N. Y. 514, 9 N. C. C. A. 286, aff'g 167 App. Div. 945.

³ Erie R. Co. v. Jacobus, 137 C. C. A. 151, 221 Fed. 335.

⁴ St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S. W. 1099, 3 N. C. C. A. 800.

⁵ Illinois Cent. R. Co. v. Porter, 125 C. C. A. 55, 207 Fed. 311.

One employed in loading car must show relation to interstate commerce. Tsmura v. Great Northern R. Co., 58 Wash. 316.

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⁶ Pecos & N. T. Ry. Co. v. Rosenbloom, 240 U. S. 439, 60 L. ed. —, rev'g — Tex. —, 173 S. W. 215.

⁷ In Pittsburgh, C., C. & St. L. Ry. Co. v. Farmers' Trust & Savings Co., — Ind. —, 108 N. E. 108.

⁸ Ross v. Sheldon, — Iowa —, 154 N. W. 499.

⁹ Cincinnati, N. O. & T. P. R. Co. v. Bonham, 130 Tenn. 435.

¹⁰ Deal v. Coal & Coke R. Co., 215 Fed. 285.

¹¹ Millette v. New York, W. & B. R. Co., 169 N. Y. App. Div. 126.

a fellow-employee held beneath it.¹² A division road master, who was killed while endeavoring to repair a brake beam which was dragging and which if it continued to drag might damage the track and switch and result in a derailment, was engaged in interstate commerce.¹³ An employee, whose duty it was to operate a turntable and to wipe engines, who at the time of his injury was obeying a direction to proceed to the turntable, was held entitled to recover under the act.¹⁴

A watchman, employed to keep trespassers from railroad premises who was injured while pursuing trespassers whom he had driven from a train was within the act;¹⁵ but a watchman at a grade crossing employed to warn trespassers on the highway of the approach of trains, who was injured while endeavoring to prevent a traveler from going upon a crossing, was not engaged in interstate commerce.¹⁶ An assistant gardener employed by an interstate carrier to cultivate its station yards is not engaged in interstate commerce¹⁷ nor was an employee, killed while cleaning stencils used for marking cars engaged in interstate commerce.¹⁸ An employee of a private logging railroad is not within the act.¹⁹

An instruction that if the decedent "at the time of his death was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part and customary work, reasonably carried on by defendant as a part of its business, transporting freight interstate over its line, or if he had then just completed such inspection of said train and had not yet completed his record and placed it in the place where usually kept, then you will return a verdict

¹² *Southern R. Co. v. Puckett*, 16 Ga. App. 551.

¹³ *Lynch's Adm'r v. Central Vermont Ry. Co.*, — Vt. —, 95 Atl. 683.

¹⁴ *Cross v. Chicago, B. & Q. R. Co.*, 191 Mo. App. 202.

¹⁵ *Smith v. Industrial Acc. Commission of California*, 26 Cal. App. 560.

¹⁶ *Louisville & N. R. Co. v. Barrett*, 143 Ga. 742.

¹⁷ *Galveston, H. & S. A. Ry. Co. v. Chojnacky*, — Tex. Civ. App. —, 163 S. W. 1011.

¹⁸ *Illinois Cent. R. Co. v. Rogers*, 136 C. C. A. 530, 221 Fed. 52.

¹⁹ *The case of Bay v. Merrill & Ring Lumber Co.*, 211 Fed. 717.

for the defendant on its special plea that plaintiff has no right to maintain this suit in the capacity in which she sues" was held erroneously refused where plaintiff sued as widow.²⁰

§ 1322. **Negligence under the act.** The act provides that common carriers by railroad engaged in interstate commerce shall be liable for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

The question as to what constitutes negligence rendering the railroad company liable is too varied in character for discussion in a chapter of this scope. Unquestionably it must be determined in the light of the decisions of the federal courts.²¹

Negligence need not be proved where a violation of the Federal Safety Appliance Act is shown, since that act imposes an absolute duty upon the railroad company to comply with its terms, and noncompliance renders it unconditionally liable for injury irrespective of the degree of care exercised.²²

It must be shown that the violation of the act complained of was the proximate cause of the injury. Thus the violation of the Federal Hours of Service Act does not of itself confer a right of action for injuries sustained by an employee working beyond the prescribed period unless such violation was the proximate cause of the injury.²³

§ 1323. **Assumption of risk.** Section 4 of the act provides as follows:

"In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injury to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common

²⁰ *Pecos & N. T. Ry. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. ed. —, rev'g — *Tex.* —, 173 S. W. 215.

²¹ See § 1304, *ante*.

²² *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281, 52 L. ed.

1061, rev'g 71 Ark. 445; *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. ed. 582.

²³ *St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, rev'g 145 Ky. 427.

carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The Supreme Court of the United States has construed the word "statute" in this section to refer solely to federal statutes,²⁴ and, except where the injury is the result of a violation of a federal statute enacted for the safety of employees, assumption of risk continues to be a defense under the Federal Employers' Liability Act.²⁵

It is not the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but the employee may assume that the employer or his agents have exercised proper care with respect to his safety until informed to the contrary unless the want of care and the danger arising from it are so obvious that an ordinarily careful and prudent person would, under the circumstances, have observed and appreciated them.²⁶

The question as to what risks are assumed is too broad a subject for discussion in a work of this kind. Elsewhere the distinction between assumption of risk and contributory negligence is pointed out.²⁷

§ 1324. Contributory negligence; effect. Under the express provisions of the act contributory negligence on the part of the injured employee is not a defense.²⁸ The section reads as follows:

²⁴ *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424.

²⁵ *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424; *Jacobs v. Southern Ry. Co.*, 241 U. S. 229, 60 L. ed. —, aff'g 116 Va. 189; *Baugham v. New York, P. & N. R. Co.*, 241 U. S. 237, 60 L. ed. —.

²⁶ *Chesapeake & O. Ry. Co. v. De Atley*, 241 U. S. 310, 60 L. ed. —, rev'g 159 Ky. 687.

²⁷ See *post*, § 1325.

²⁸ *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156; *Kenney v. Seaboard Air Line Ry. Co.*, 165 N. C. 99; *La Mere v. Railway Transfer Co.*, 125 Minn. 159; *Gee v. Lehigh Valley R. Co.*, 163 N. Y. App. Div. 274; *Pfeiffer v. Oregon-Washington R. & Nav. Co.*, 74 Ore. 307, 7 N. C. C. A. 685, writ of error dismissed 239 U. S. 658, 60 L. ed. —; *Fish v. Chicago, R. I. & P. Ry. Co.*, 263 Mo. 106, 8 N. C. C. A. 538; *Mattocks v. Chicago & A. Ry. Co.*, 187 Ill. App. 529; *Baltimore & O. R.*

"In all actions hereafter brought against any such common carrier by railroad under and by virtue of any of the provisions of this act to recover damages for personal injuries to an employee or where such injuries have resulted in his death, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." ²⁹

The purpose of the act was to abrogate the common-law rule completely exonerating the carrier where contributory negligence was established, and to substitute a new rule, confining the exoneration arising from the failure of the employee to use due care for his safety to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee. ³⁰

The statutory direction that the diminution shall be in proportion to the amount of negligence attributable to such employee; means that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; ³¹

Co. v. Whitacre, 124 Md. 411; *Saunders v. Southern Ry. Co.*, 167 N. C. 375; *Easter v. Virginian Ry. Co.*, — W. Va. —, 86 S. E. 37; *Southern Ry. Co. v. Peters*, — Ala. —, 69 So. 611; *Charleston & W. C. Ry. Co. v. Sylvester*, — Ga. App. —, 86 S. E. 275.

²⁹ Section 3, Act of April 22, 1908, 35 U. S. Stat. L. 65, c. 149.

³⁰ *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096.

³¹ *Norfolk & W. R. Co. v. Earnest*,

229 U. S. 114, 57 L. ed. 1096; *Grand Trunk Western Ry. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, aff'g 120 C. C. A. 166, 201 Fed. 836; *Nashville, C. & St. L. Ry. v. Henry*, 158 Ky. 88; *Seaboard Air Line Ry. v. Tilghman*, 237 U. S. 499, 59 L. ed. 1069, rev'g 167 N. C. 163; *Louisville & N. R. Co. v. Lankford*, 126 O. C. A. 247, 209 Fed. 321; *Chadwick v. Oregon-Washington R. & Nav. Co.*, 74 Ore. 19.

hence no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, bar recovery where the defendant was also negligent,³² for, of course, it would be impossible for the plaintiff's negligence to equal the combined negligence of both the plaintiff and the defendant.³³

In considering the question of contributory negligence for the purpose of reducing the damages, it cannot too strongly be emphasized that the negligence of the employee is not compared with the negligence of the defendant. If such were the rule, in the event of equality of fault there could be no recovery. As clearly pointed out by the supreme court the quantum of negligence chargeable to the employee is to be determined upon the basis of the proportion it bears to the combined negligence of both parties.³⁴ To illustrate the rule mathematically, if the combined negligence of both parties is placed at 100, and the employee is chargeable with ninety per cent. of the entire amount he would still be entitled to recover ten per cent. of his total damages, the amount of his damages being reduced ninety per cent. on account of his contributory negligence.³⁵

Even where contributory negligence is shown it will not be considered unless it directly and proximately contributed to the injury. In other words, it must be causal in character,³⁶ and

³² *Pennsylvania Co. v. Cole*, 131 C. C. A. 244, 214 Fed. 948 (where a brakeman on a standing train was injured in a rear-end collision while asleep in the caboose, when, it was claimed, he should have flagged the following train). *Louisville & N. R. Co. v. Heinig's Adm'x*, 162 Ky. 14, (where decedent, an engineer, negligently failed to give signal of his approach to meeting point of trains resulting in collision with waiting train, it having been the conductor's duty to listen for such signals on approaching the meeting point and on failure to hear them to stop the train by means of the angle-cock.

See also, *New York, C. & St. L.*

R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 952.

³³ *Pennsylvania Co. v. Cole*, 131 C. C. A. 244, 214 Fed. 948.

³⁴ *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096; *Chadwick v. Oregon-Washington R. & Nav. Co.*, 74 Ore. 19.

³⁵ *Chadwick v. Oregon-Washington R. & Nav. Co.*, 74 Ore. 19.

³⁶ *Illinois Cent. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311. See also, *Coney Island Co. v. Dennon*, 79 C. C. A. 375, 149 Fed. 687, and *Toledo, St. L. & W. R. Co. v. Kountz*, 94 C. C. A. 244, 168 Fed. 832.

this is true, in actions under the federal act, irrespective of the rule prevailing in the state courts.³⁷

Damages and contributory negligence being so blended and interwoven, and the conduct of the plaintiff at the time of the injury being so important a matter in the assessment, it is rarely permissible for the court to submit the questions of damages to the jury without also permitting them to consider the conduct of the plaintiff at the time of the injury.³⁸

§ 1325. **Same subject; distinction between contributory negligence and assumption of risk.** The distinction between contributory negligence and assumption of risk was not of great importance in actions at common law, since the presence of either prevented a recovery. For this reason the courts were not always careful in applying the principles underlying these two defenses to the facts presented. The distinction is of the greatest importance in actions under the Federal Employers' Liability Act, however, since while contributory negligence has been abolished as a defense, assumption of risk, if shown, bars a recovery, except where a federal act, intended for the safety of employees, is violated.³⁹

The difference has been very clearly pointed out by the United States Supreme Court. "Contributory negligence," said the court, "involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some em-

³⁷ *Illinois Cent. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311, 6 N. C. C. A. 98n.

³⁸ *Norfolk-Southern R. Co. v. Ferebee*, 238 U. S. 269, 59 L. ed. 1303, aff'g 163 N. C. 351.

³⁹ *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424; s. c. 239 U. S. 595, 60 L. ed. —, aff'g 157 N. C. 146, 162 N. C. 424.

poyments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person would have observed and appreciated them.”⁴⁰

In another decision it was said: “Assumption of risk rests upon the intelligent acquiescence and knowledge of the danger and appreciation of the risk naturally incident to the employment, or arising from a particular situation in which the work is done. It negatives the *prima facie* liability of the master, and does not involve the aggravation or creation of the peril by misconduct of the servant. On the other hand, contributory negligence rests on the breach of duty to exercise ordinary care. It displaces the *prima facie* liability of the master, adds a new danger to the situation not necessarily incident to the work, and is imposed by law upon the servant, however unwilling or protesting he may be. Though some authorities hold that assumption of risk is not based upon contract, it is generally held to grow out of the contract of employment, and of the application

⁴⁰ *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424. See also, *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 220 U. S. 590, 55 L. ed. 596.

The act of a brakeman in going through the yards in search of a drinking cup in the course of which he fell into a cinder pit involves the application of the doctrine of contributory negligence, not as-

sumption of risk. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411.

The fact that decedent may have known beforehand that an engine on a cross-over track was too close to the track upon which he was operating his engine involves the application of the doctrine of contributory negligence, not assumption of risk. *Louisville & M. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

of the maxim '*volenti non fit injuria.*' The test of knowledge of danger is not the exercise of ordinary care to discover the danger, but whether the danger was known to or plainly observable by the employee. The test of appreciation of risk is whether the servant understood the risk, or by the exercise of ordinary care ought to have understood it. * * *

"Notwithstanding this distinction, it is generally held that assumption of risk and contributory negligence frequently approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom."⁴¹

While it is a general rule that an employee cannot without impairing his right to recover from the employer, remain at work in presence of a known danger so imminent that no reasonably prudent man would confront it, even though the employer has promised to repair, the authorities differ as to whether the recovery is defeated upon the ground of assumption of risk or contributory negligence. The question has not as yet been definitely determined by the Supreme Court of the United States with respect to the Federal Employers' Liability Act.⁴²

§ 1326. Same subject; employee's negligence as the sole cause of injury. The failure of the employee to exercise ordinary care for his own safety must be distinguished from acts of the employee constituting the sole cause of the injury; in other words, where there is an absence of concurring negligence on the part of the carrier proximately contributing to the accident. In the latter case, of course, the defendant is not liable for there is no negligence upon which liability can be predicated.⁴³ However, it must be borne in mind that the statute permits a recovery where the injury resulted "in whole or *in part*" from the defendant's negligence, consequently where it is negligent, the defendant cannot escape liability by calling the plaintiff's act

⁴¹ Chesapeake & O. Ry. Co. v. De Atley, 159 Ky. 687, rev'd on other grounds 241 U. S. 310, 60 L. ed. —.

⁴² Seaboard Air Line Ry. v. Horton, 239 U. S. 595, 60 L. ed. —, aff'g 157 N. C. 146, 162 N. C. 424.

⁴³ Fletcher v. South Dakota Cent. Ry. Co., — S. D. —, 155 N. W. 3;

Gee v. Lehigh Val. R. Co., 163 N. Y. App. Div. 274; Ellis' Adm'r v. Louisville, H. & St. L. R. Co., 155 Ky. 745 (where a flagman sent out to flag trains was struck by a train which he was supposed to flag, no evidence of negligence on the part of the engineer being shown);

the proximate cause.⁴⁴ Hence the mere fact that the contributory negligence of an employee was the proximate cause of his injury will not prevent a recovery.⁴⁵

It is only where the plaintiff's act is the sole cause, in other words, when the defendant's act is no part of the causation, that defendant can escape liability under the act.⁴⁶ If the defend-

Charleston & W. C. Ry. Co. v. Sylvester, — Ga. App. —, 86 S. E. 275 (act of employee in passing between moving cars held sole cause of injury).

⁴⁴ Grand Trunk Western Ry. Co. v. Lindsay, 120 C. C. A. 166, 201 Fed. 836, aff'd 233 U. S. 42, 58 L. ed. 838; Smith v. Atlantic Coast Line R. Co., 127 C. C. A. 311, 210 Fed. 761; Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611.

⁴⁵ Louisville & M. R. Co. v. Heinig's Adm'x, 162 Ky. 14.

⁴⁶ Grand Trunk Western Ry. Co. v. Lindsay, 120 C. C. A. 166, 201 Fed. 836, aff'd 233 U. S. 42, 58 L. ed. 838; Smith v. Atlantic Coast Line R. Co., 127 C. C. A. 311, 210 Fed. 761 (holding that where the employee, seeing that because of the defective condition of the coupler it would not couple automatically, endeavored to press the bumper into position with his foot, the question as to whether his act was the sole cause of the injury should have been left to the jury); Chesapeake & O. Ry. Co. v. De Atley, 159 Ky. 687, rev'd 241 U. S. 310, 60 L. ed. — (where an employee attempting to board a moving train slipped and was thrown under the wheels by the speed of the train); Hobbs v. Great Northern Ry. Co., 80 Wash. 678 (recovery refused where a hostler was injured riding on pilot in violation of orders); Pennsylvania R. Co. v. Goughnour, 126 C. C. A. 39, 208 Fed. 961 (where a conductor making a coupling was

injured when the rear of his train was struck by another train, it was held that plaintiff's omission to see that the flagman performed his duty was not the sole cause); Pennsylvania Co. v. Sheeley, 137 C. C. A. 471, 221 Fed. 901 (where plaintiff, a fireman, after calling the engineer's attention to a green light paid no further attention to the engineer's failure to slow down, it was held that his non-action constituted contributory negligence merely and was not the sole proximate cause).

Fireman's failure to see signal indicating an open switch held contributory negligence merely and not the sole cause. Hackney v. Missouri, K. & T. Ry. Co., 96 Kan. 30.

Defendant held not liable for death of experienced fireman acquainted with general condition of premises who was killed by contact with a car on an adjoining track on account of the alleged proximity of the tracks. Reese v. Philadelphia & R. Ry. Co., 239 U. S. 463, 60 L. ed. —, 10 N. C. C. A. 926, aff'g 140 C. C. A. 660, 225 Fed. 518.

Recovery for death of section foreman who stepped on track in front of approaching engine notwithstanding repeated warnings held barred by his negligence which was the sole cause. Chesapeake, Western Ry. v. Shiffett's Adm'x, — Va. —, 86 S. E. 860.

Where a brakeman voluntarily placed himself in a position of dan-

ant was guilty of any negligence whatever, however slight, which contributed to cause the injury, it cannot be contended that the negligence of the plaintiff was the sole proximate cause of the accident.⁴⁷

Where the negligence of the defendant was not a continuous

ger where he was crushed between a moving car and a platform, his negligence was held the sole cause of the injury. *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 6 N. C. C. A. 74.

Going between moving cars to uncouple them bars recovery in the absence of negligence on the part of defendant. *Nashville, C. & St. L. Ry. v. Henry*, 158 Ky. 88.

Where an engineer was injured while standing by his engine in violation of rules, a recovery was permitted, negligence being shown on the part of the defendant. *Pfeiffer v. Oregon-Washington R. & Nav. Co.*, 74 Ore. 307, 7 N. C. C. A. 685, writ of error dismissed, 239 U. S. 658, 60 L. ed. —.

An instruction that if decedent, an engineer, had been flagged in time to have prevented a collision and he was not on the lookout, such conduct would constitute contributory negligence diminishing the damages was held erroneous as permitting a recovery where the employee's negligence was the sole cause of the accident. *Louisville & N. R. Co. v. Holloway's Adm'r*, 163 Ky. 125.

Where a roadmaster went under a car after hearing the conductor direct a brakeman to tell the engineer not to move the train pending repairs, and was killed upon the movement of same, his negligence was held not to render that of the trainmen remote. *Lynch's Adm'r v. Central Vermont Ry. Co.*, — Vt. —, 95 Atl. 683.

Plaintiff's stumbling on greasy

floor held not sole cause of injury where he fell against an unguarded crank shaft. *Knapp v. Great Northern R. Co.*, 130 Minn. 405, aff'd 240 U. S. 464, 60 L. ed. —.

The act of an engineer in using a Buckner gauge without a guard glass when he could have cut it off and used the gauge-cocks held not as a matter of law, the proximate cause of his injury caused by the bursting of the glass. *Seaboard Air Line Ry. v. Horton*, 239 U. S. 595, 60 L. ed. —, aff'g 157 N. C. 146, 162 N. C. 424.

Where an employee sent out to flag a train, placed no torpedoes on the track but placed his lantern on the ground and then laid down beside the track with his head on a cross tie and while in this position was struck by the train which he was sent to flag, the injury was the result of the sole negligence of the employee. *Southern Ry. Co. v. Gray*, 241 U. S. 333, 60 L. ed. —, rev'g 167 N. C. 433.

See also, *Louisville & N. R. Co. v. Johnson's Adm'r*, 161 Ky. 824, where the question as to whether decedent killed was while relieving nature between two box cars where he was out of sight, as claimed by defendant, or at the end of a train of box cars with the knowledge of the section foreman, who knew or should have known of the approach of the cars which inflicted the injury, as claimed by the plaintiff was held a question for the jury.

⁴⁷*Houston Belt & Terminal Ry. Co. v. Barger*, — Tex. Civ. App. —, 176 S. W. 870.

sequence proximately causing the injury, but was broken by an act of the plaintiff constituting a new intervening cause independent of the defendant's act and which broke the causal connection, there can be no recovery.⁴⁸ The violation by the employee of a rule the observance of which was essential to imposition upon the defendant of a duty toward him may constitute the sole, proximate cause of the injury.⁴⁹ Thus where a brakeman was killed in a collision following the stopping of his train upon its breaking apart, he having failed to conform with the rule of defendant which required him in the event of the stopping of his train between stations immediately to protect his train by going back a sufficient distance to warn oncoming trains, it was held that his own negligence was the sole cause of the accident.⁵⁰ A similar rule applies to the disobedience of positive orders, resulting in injury.⁵¹

Negligence on the part of the employee which would otherwise be the sole cause of the injury may be affected by subsequent negligence on the part of the defendant and the application of the "last clear chance" doctrine.⁵² Since the "last clear chance" doctrine presupposes antecedent negligence upon the part of the person injured it would seem that in such cases the

⁴⁸ *Southern Ry. Co. v. Peters*, — Ala. —, 69 So. 611.

⁴⁹ *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444, 60 L. ed. —, rev'g 125 Minn. 348; *Kentucky & T. Ry. Co. v. Minton*, 167 Ky. 516, where a car inspector went under a car without placing the warning signals required by the defendant's rules.

⁵⁰ *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444, 60 L. ed. —, rev'g 125 Minn. 348; *Ellis' Adm'r v. Louisville, H. & St. L. R. Co.*, 155 Ky. 745; *Culp v. Virginian Ry. Co.*, — W. Va. —, 87 S. E. 187 (where it was held that there could be no recovery for the death of a railroad conductor in a collision if such collision was due solely to the

failure of the conductor to perform his duty to see that following trains were properly flagged).

⁵¹ Where an engineer who had been ordered to reduce speed to 10 miles per hour at a certain point because of the condition of the track, was killed in a derailment while traveling at a speed of about 45 miles per hour, it was held there could be no recovery. *Kendrick v. Chicago & E. I. R. Co.*, 188 Ill. App. 172. While this decision was based upon the doctrine of assumption of risk, it is apparent that the employee's negligence was the sole cause of the accident.

⁵² *Raines v. Southern Ry. Co.*, 169 N. C. 189.

question of contributory negligence is always present. However a recent decision is somewhat obscure on the question.⁵³

While it has been held that contributory negligence, to be available, must be pleaded,⁵⁴ the claim that plaintiff's negligence was the sole cause of the injury is available under the general issue.⁵⁵

§ 1327. Same subject; what constitutes contributory negligence. The act has not changed the rule as to what constitutes contributory negligence,⁵⁶ and, as in other actions, the question must be determined in the light of the age and experience of the employee.⁵⁷ It has been held that it is not available unless pleaded.⁵⁸

⁵³ *Raines v. Southern Ry. Co.*, 169 N. C. 189. In this case the court said: "If, notwithstanding his (decendent's) negligence in sleeping on the track, the defendant's engineer, after he saw him lying there and became aware of his perilous situation, could, by exercising the proper care, have stopped the train in time to avoid the injury, and failed to do so, his negligence in not doing so would be considered the proximate cause of intestate's death." The court held erroneous an instruction that if decedent placed himself in a position of peril on the track he would be guilty of contributory negligence. At best this must be regarded as a very doubtful decision.

⁵⁴ *San Antonio & A. P. Ry. Co. v. Littleton*, — Tex. Civ. App. —, 180 S. W. 1194. But see *Kansas City Southern Ry. Co. v. Jones*, 241 U. S. 181, 60 L. ed. —, rev'g 137 La. 178.

⁵⁵ *Southern Ry. Co. v. Peters*, — Ala. —, 69 So. 611.

⁵⁶ *Raines v. Southern Ry. Co.*, 169 N. C. 189.

A conductor passing between cars which he supposed to be "dead," and which would have been "dead" had

the instructions which he had previously delivered to his subordinate been carried out, is not guilty of contributory negligence. *Murphy v. Atlanta & C. Air Line Ry. Co.*, — S. C. —, 87 S. E. 310, s. c. 89 S. C. 15.

⁵⁷ *Raines v. Southern Ry. Co.*, 169 N. C. 189. In this case a boy between 15 and 16 years of age was sent out to flag an approaching train, and in attempting to do so was struck and killed. The court instructed the jury as follows on the issue of contributory negligence:

"If he sat down near the track in a dangerous position, if you find he thought that he was far enough away, if he put himself in a perilous position upon the railroad track, and he was killed, the court charges you that he would be guilty of contributory negligence, and it would be your duty to answer the second issue, 'Yes.'"

This instruction was held erroneous by the supreme court. This decision goes very far, as in another portion of the opinion the court intimates that the employee was sleeping on the track. On the latter question the court says: "If

A superior servant is not chargeable with the negligence of his subordinate merely because the latter was under his control.⁵⁹ A reasonable reliance by an employee upon the employer's promise to repair a defect is as good an answer to the charge of contributory negligence as to the contention that the risk was assumed.⁶⁰

The question of contributory negligence is for the jury to determine, unless from all the evidence and circumstances only one conclusion could reasonably be reached; namely, that the defendant was at fault and thereby contributed to his injury.⁶¹ But where contributory negligence is clearly shown, the court should so instruct the jury, with directions as to how to apportion the damages if they believe the defendant to have been negligent.⁶² The jury is entitled to consider all the circumstances which tend to fix the quality and quantity of the plaintiff's contributory negligence in its relation to the sum total of the negligence of both parties, and even though the negligence

the deceased had fallen asleep on the track, his negligence in doing so would not be contributory, in a legal sense, unless it was the proximate cause of the injury to him."

⁵⁸ *San Antonio & A. P. Ry. Co. v. Littleton*, — Tex. Civ. App. —, 180 S. W. 1194. But see *Kansas City Southern Ry. Co. v. Jones*, 241 U. S. 181, 60 L. ed. —, rev'g 137 La. 178.

⁵⁹ *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 9 N. C. O. A. 146, where a conductor was injured by the pulling out of a draw-head, the defective condition of which had not, through the negligence of the brakeman, been discovered.

⁶⁰ *Seaboard Air Line Ry. v. Horton*, 239 U. S. 595, 60 L. ed. —, aff'g 157 N. C. 146, 162 N. C. 424.

⁶¹ *Pfeiffer v. Oregon-Washington R. & Nav. Co.*, 74 Ore. 307, 7 N. C. A. 685, writ of error dismissed 239 U. S. 658, 60 L. ed. —, where it was held that an engineer leaving his engine on the main line to

make a necessary repair was not guilty of contributory negligence as a matter of law, although defendant's rules imposed certain restrictions upon the leaving of engines and the making of repairs.

Hawkins v. St. Louis & S. F. R. Co., 189 Mo. App. 201, where it was held that the contributory negligence of a roundhouse foreman who tripped on an obstruction while walking beside an engine which he was piloting out of the structure was for the jury.

Where a locomotive engineer while walking between the tracks of defendant's main line was struck and killed by an engine operated without signal, warning or lookout, and which could not have been seen owing to clouds of steam and smoke from defendant's roundhouse and other engines, decedent's contributory negligence was held a question for the jury. *Huxoll v. Union Pac. R. Co.*, — Neb. —, 155 N. W. 900.

of either party clearly appears, all circumstances of aggravation or of mitigation must be considered.⁶³

§ 1328. Same subject; burden of proof. Under the rule followed by the federal courts the burden is upon the defendant to establish contributory negligence upon the part of the employee,⁶⁴ and this is true even in states, where under the state law proof of freedom from contributory negligence is an essential element of plaintiff's case, in other words where the burden is upon the plaintiff as part of his case to disprove contributory negligence.⁶⁵ Consequently even in an action in a state court, under the Federal Employers' Liability Act, the burden is upon the defendant to show contributory negligence, since it is not a mere matter of local procedure.⁶⁶

§ 1329. Same subject; violation of federal statutes. Contributory negligence will not be considered in diminution of damages where the violation of the Federal Safety Appliance Act, or other federal act intended for the protection of employees, was a proximate cause of the accident.⁶⁷ But the statute, the breach of which will prevent the consideration of contributory negligence in diminution of damages must be a federal statute, as distinguished from a state law or local regulation.⁶⁸

⁶² Louisville & M. R. Co. v. Heinig's Adm'x, 162 Ky. 14; Holmberg v. Lake Shore & M. S. Ry. Co., — Mich. —, 155 N. W. 504, where plaintiff, an engineer on an extra train, was injured in a collision with a train having the right of way, while operating his train in violation of defendant's rules to clear the main track five minutes before the approach of trains having the right of way.

⁶³ New York, C. & St. L. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 952.

⁶⁴ Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096.

⁶⁵ Central Vermont Ry. Co. v.

White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330;

⁶⁶ Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330.

⁶⁷ Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, aff'g 120 C. C. A. 166, 201 Fed. 836; La Mere v. Railway Transfer Co., 125 Minn. 159; Smith v. Atlantic Coast Line R. Co., 127 O. C. A. 311, 210 Fed. 761; Fletcher v. South Dakota Cent. Ry. Co., — S. D. —, 155 N. W. 3; St. Louis Southwestern Ry. Co. v. Anderson, 117 Ark. 41; Sears v. Atlantic Coast Line R. Co., 169 N. C. 446.

⁶⁸ Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, aff'g 162 N. C. 424;

However, a violation by the defendant of a federal statute does not deprive it of the right to show contributory negligence unless such violation contributed to the injury.⁶⁹

§ 1330. **Same subject; instructions on contributory negligence.** The plaintiff is entitled to a plain and unambiguous instruction to the effect that contributory negligence is not a complete defense.⁷⁰ But the defendant is also entitled to have the question of contributory negligence put before the jury in a reasonably definite and concrete form.⁷¹

As the statute prescribes a rule for determining the amount of the deduction required to be made, the jury should be advised of the rule and its controlling force.⁷² Hence an instruction submitting to the jury the matter of diminishing the damages without naming any standard to which their actions should conform other than their own conception of what was reasonable, is erroneous.⁷³

As has already been shown the basis for diminishing the damages is the proportion which the employee's negligence bears to the combined negligence of both employee and the company. Consequently, an instruction that where contributory negligence is shown, the damages are to be diminished "in proportion to his [plaintiff's] negligence as compared with the negligence of the defendant" is improper,⁷⁴ since it merely requires a comparison of the negligence of each instead of requiring the

Gee v. Lehigh Val. R. Co., 163 N. Y. App. Div. 274; Lauer v. Northern Pac. Ry. Co., 83 Wash. 465, overruling Opsahl v. Northern Pac. Ry. Co., 78 Wash. 197.

⁶⁹ Atchison, T. & S. F. Ry. Co. v. Swearingen, 239 U. S. 339, 60 L. ed. —, 10 N. C. C. A. 778.

⁷⁰ Ross v. St. Louis & S. F. R. Co., 93 Kan. 517, 7 N. C. C. A. 737.

⁷¹ Pennsylvania Co. v. Sheeley, 137 C. C. A. 471, 221 Fed. 901.

⁷² Seaboard Air Line Ry. v. Tilghman, 237 U. S. 499, 59 L. ed. 1069, rev'g 167 N. C. 163.

⁷³ Seaboard Air Line Ry. v. Tilghman, 237 U. S. 499, 59 L. ed. 1069,

rev'g 167 N. C. 163. Here the court instructed the jury that, if they found that the plaintiff was injured through the concurring negligence of the railway company and the plaintiff, they should determine the full amount of damages sustained by him, "and then deduct from that whatever amount you think would be proper for his contributory negligence."

⁷⁴ Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096; Nashville, C. & St. L. R. Co. v. Banks, 156 Ky. 609; Nashville, C. & St. L. Ry. v. Henry, 158 Ky. 88.

diminution to rest upon a comparison with the entire negligence of both. As pointed out by the supreme court, the instruction should have read "as compared with the combined negligence of himself and the defendant." ⁷⁵

An instruction that where contributory negligence is shown the damages, if any, are to be diminished "in proportion to his [plaintiff's] negligence as compared with the combined negligence, if any, of the plaintiff and the defendant, if any," states the law correctly. ⁷⁶

A charge in almost the identical language of the statute is not erroneous, ⁷⁷ especially where the defendant makes no request for a charge clarifying any obscurity on the subject which he deemed existed. ⁷⁸ Consequently, an instruction that if the jury found the plaintiff guilty of contributory negligence they should "reduce his damages in proportion to the amount of negligence which is attributable to him" is not erroneous, ⁷⁹ and an instruction upon the effect of contributory negligence, following the language of the statute is not inconsistent with an instruction that the "damage should be diminished in the proportion that deceased's negligence bears to the combined negligence of the deceased and the defendant." ⁸⁰ The danger of relying upon instructions in the language of the statute is that the jury may apply the old comparative negligence rule; in other words, compare the negligence of the plaintiff with that of the defendant, instead of the quantum of negligence attributable to each as compared with the joint negligence attributable to both. Courts have made the same mistake. Common sense would suggest the adoption of the form of instruction laid down by the Supreme Court of the United States.

⁷⁵ *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096.

⁷⁶ *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 9 N. C. C. A. 146.

⁷⁷ *Devine v. Chicago, R. I. & P. Ry. Co.*, 185 Ill. App. 488, aff'd 266 Ill. 248, which is affirmed by 239 U. S. 52, 60 L. ed. —; *Missouri, K. & T. Ry. Co. of Texas v. Rentz*, — Suth. Dam. Vol. V.—16.

Tex. Civ. App. —, 162 S. W. 959; *Irvin v. Southern R. Co.*, 64 N. C. 5. But see *Cross v. Chicago, B. & Q. R. Co.*, 191 Mo. App. 202.

⁷⁸ *St. Louis & S. F. R. Co. v. Brown*, 241 U. S. 223, 60 L. ed. —.

⁷⁹ *Id.*

⁸⁰ *St. Louis, I. M. & S. Ry. Co. v. Rodgers*, 118 Ark. 263.

An instruction that it was the duty of the jury to diminish or reduce the damages attributable to defendant's negligence in proportion to the amount of negligence justly chargeable to the plaintiff, and if there should be any difference in favor of the plaintiff, after the damages were reduced to a money value, such difference should be the amount of their verdict has been held substantially correct.⁸¹ However, it is substantially in the language of the statute and objectionable for the reason just pointed out.

An instruction that if the plaintiff failed to exercise reasonable care for his own safety, "and by reason of such failure he contributed to bring about the injuries to him, *and but for which he would not have been injured*, then you will diminish the damages in proportion to such negligence" was held too broad as to the italicized portion although it would have been proper if contributory negligence were a complete bar.⁸²

An instruction that if the jury found the defendant to have been negligent, and that plaintiff also was "guilty of negligence contributing to his injury, and his negligence is less than that of the defendant company, then, instead of his contributory negligence being a bar to his recovery, you should take the amount of damages which you found against the defendant company, if you so find, and compare it with the amount of negligence attributable to Sheeley [plaintiff], and set off against the amount you so find, if you so find against the defendant company, this lesser amount of Sheeley's, if you so find it, and discount the damages attributable to the defendant if you find it negligent, in the ratio that this lesser negligence on behalf of Sheeley bore to the greater negligence on behalf of the defendant company if you so find it negligent" is erroneous for obvious reasons,⁸³ as is an instruction that the damages should be diminished in proportion to the relative negligence of the two parties.⁸⁴

An instruction that if plaintiff's injuries "were due directly

⁸¹ Chadwick v. Oregon-Washington R. & Nav. Co., 74 Ore. 19.

⁸³ Pennsylvania Co. v. Sheeley, 137 C. C. A. 471, 221 Fed. 901.

⁸² Nashville, C. & St. L. Ry. v. Henry, 158 Ky. 88.

⁸⁴ New York, C. & St. L. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 952.

to the absence and imperfect working condition of the coupler in question" the defendant would be liable, is correct.⁸⁵ A requested instruction that riding on the pilot with knowledge of apparent and obvious danger, and without necessity, would imperatively reduce the damages to a nominal sum is properly refused.⁸⁶

An instruction that "if you find from the evidence that the contributory negligence of the deceased * * * was the sole and proximate cause of his death, then you should find a verdict for the defendant" is erroneous for the reason that contributory negligence presupposes concurring negligence on the part of the defendant.⁸⁷ An instruction upon the effect of contributory negligence stating that if the jury found the plaintiff guilty of contributory negligence "the damages shall be diminished" is not erroneous merely because followed by a clause that contributory negligence "goes by way of diminution of damages."⁸⁸

It has been held that an instruction that the recovery, if any, should be reduced "by such an amount as you find the negligence attributable to him [plaintiff] bore in proportion to the negligence of the defendant company" was not prejudicial where the court also instructed that "if the negligence of the plaintiff was as great as the negligence of the defendant, there might be an equality of negligence, and therefore no substantial recovery of any amount of damages could be had."⁸⁹ This de-

⁸⁵ *Great Northern Ry. Co. v. Otos*, 239 U. S. 349, 60 L. ed. —, aff'g 128 Minn. 283.

⁸⁶ *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321.

⁸⁷ *Ross v. St. Louis & S. F. R. Co.*, 93 Kan. 517, 7 N. C. C. A. 737. See, however, *Pennsylvania R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961, where the instruction given authorized a verdict against plaintiff "because the amount to be deducted, if his contributory negligence was the sole cause of the accident, would wipe out the damages." This instruction is an ab-

surdity for the reason that recovery is precluded where the employee's act is the sole cause of the injury, not because the damages are thereby wiped out according to the rule of proportion, but because in such a case it cannot be said that negligence on the part of defendant contributed "in whole or in part" to the injury. It may be noted, however, that this instruction was not attacked by the plaintiff.

⁸⁸ *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096.

⁸⁹ *Pennsylvania Co. v. Cole*, 131 C. C. A. 244, 214 Fed. 948.

cision is unique as both instructions are palpably wrong, both being based upon a comparison of the negligence of the one with that of the other. Inasmuch as the latter portion of the instruction was clearly prejudicial to the plaintiff in assuming that equality of negligence would bar a substantial recovery, it is probable the court arrived at the conclusion that the defendant was not prejudiced. However even the latter portion of the instruction might be regarded as emphasizing by illustration the error common to the entire instruction.

An instruction that an employee has the right to assume, and to rely upon the assumption, in his work, that the track was reasonably free from overhead obstructions, and if he did not have knowledge of the existence of such obstructions he was not required to examine to determine whether defendant has performed its duty, is not erroneous.⁹⁰

§ 1331. **Damages for personal injuries.** In an action for personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade, and has, as the result of his injury been deprived of his capacity of earning.⁹¹ Future damages may be recovered if proved,⁹² and where the evidence shows that there will be future effects from an injury, an instruction justifying an inclusion of same in the award of damages is not erroneous.⁹³

⁹⁰ *Bruckshaw v. Chicago, R. I. & P. Ry. Co.*, — Iowa —, 155 N. W. 273.

⁹¹ *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, citing *Wade v. Leroy*, 20 How. 34, 15 L. ed. 813; *Nebraska City v. Campbell*, 2 Black 590, 17 L. ed. 271; *Ballou v. Farnum*, 11 Allen (Mass.) 73; *New Jersey Exp. Co. v. Nichols*, 3 Vroom (N. J. L.) 166, *aff'd* 4 Vroom (N. J. L.) 434; *Phil-*

lips v. London & S. W. Ry. Co., 4 Q. B. D. 406, 5 Q. B. D. 78.

The measure of recovery for the loss of expected future earnings, however, is confined to the present cash value of such earnings. *Chesapeake & O. Ry. Co. v. Kelly*, 241 U. S. 485, 60 L. ed. —.

⁹² *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 37 L. ed. 284.

⁹³ *Chesapeake & O. Ry. Co. v. Carnahan*, 241 U. S. 241, 60 L. ed. —.

Expenses, loss of time, suffering and diminished earning power form elements of recovery.⁹⁴

The plaintiff's capacity to labor will not be determined as of the precise time of the injury where as the result of temporary illness an occupation previously pursued had been given up, such illness having practically terminated at the time of the injury in suit, which incapacitated him for further work.⁹⁵

Mental pain and suffering inevitably and necessarily resulting from the injury constitute a proper element of damages,⁹⁶ for "when the injury, whether caused by wilfulness or by negligence, produces mental, as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude mental suffering in estimating the extent of the personal injury for which compensation is to be awarded."⁹⁷ And an instruction that "the jury are to consider mental suffering, past and future, found to be the necessary consequence of the loss of his leg" has been held to state the law correctly.⁹⁸ An instruction that plaintiff may recover for such pain and suffering caused by the injury as he "may in the future suffer" has been held erroneous.⁹⁹ The court arrived at its conclusion upon the rule laid down in an earlier case,¹ as follows: "The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such suffering and other evil effects as are reasonably certain to result from it. Possible, even probable future damages are too remote and speculative to form the basis of legal injury. If they may or subsequently do result from the accident, they are but a part of that *damnum absque injuria* which reaches too

⁹⁴ Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611.

⁹⁵ Texas & P. Ry. Co. v. Humble, 181 U. S. 57, 45 L. ed. 747.

⁹⁶ Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110; McIntyre v. Giblin, 131 U. S. CLXXIV, 25 L. ed. 572.

⁹⁷ Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110.

⁹⁸ McDermott v. Severe, 202 U. S. 600, 50 L. ed. 1162.

⁹⁹ Chicago, M. & St. P. R. Co. v.

Lindeman, 75 C. C. A. 18, 143 Fed. 946. The supreme court in passing upon an instruction upon recovery for future pain and suffering referred to the rule laid down in this case as conservative. Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162, 57 L. ed. 170.

¹ Chicago & N. W. R. Co. v. De Clow, 61 C. C. A. 34, 124 Fed. 142.

far into the realm of conjecture to form any basis of an action at law."

The supreme court has intimated that possibly an increase in wages which the plaintiff would receive by a fixed rule of promotion may be considered by the jury in estimating the damages,² but a mere possibility or expectancy of promotion cannot be considered.³ In an action under the Federal Employers' Liability Act the defendant requested the court to charge that "in awarding damages, the jury must take into consideration the fact that the earning power of the deceased might, at any time, have been materially, or even wholly destroyed. You are to further consider that and make proper allowances for the probable decreased earning power of the deceased arriving at the approaching old age." The request was given except as modified by the charge "that if you find his earning capacity would probably be increased, you can take that into consideration just as you take into consideration the probability of his earning capacity being decreased; just whatever is probable."⁴ While this instruction was given in an action for wrongful death, it is

² *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 37 L. ed. 728.

³ *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 37 L. ed. 728, citing with approval *Richmond & D. R. Co. v. Allison*, 86 Ga. 145. In the *Elliott* case the plaintiff after testifying to his age, health and the wages he was receiving at the time of the accident was asked: "What were your prospects of advancement, if any, in your employment on the railroad and of obtaining higher wages?" In response he stated that he thought that by staying with the company he would be promoted; that in the absence of the yardmaster he had sometimes discharged his duties, and also in like manner temporarily filled the place of other employees of the company of a higher grade of service than his own; that there was a "system by which

you go in there as coupler or train-hand or in the yard, and if a man falls out you stand a chance of taking his place," and that the average yard conductor received a salary of from \$60 to \$75 per month. The admission of this evidence was held erroneous.

⁴ *Thornton v. Seaboard Air Line Ry.*, 98 S. C. 348. This decision was reversed by the United States Supreme Court (238 U. S. 605, 59 L. ed. 1485) upon the authority of *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424. The instruction in question was not considered by the supreme court. Its correctness would undoubtedly depend upon the sufficiency of the evidence to show a probability of increase or decrease in earning capacity.

equally applicable in an action by the employee for personal injuries.

The Supreme Court of Kentucky held improper an instruction that the jury were to award such sum as "will fairly and reasonably compensate him [the plaintiff] for injuries to his person" on the ground that the words "for injuries to his person" should have been omitted, the court saying that "what would compensate a man for losing both of his hands is too uncertain to be submitted to a jury."⁵ An instruction authorizing a recovery "for injuries to his [plaintiff's] person and for physical and mental suffering, if any of either, suffered on account of said injuries, and for permanent injury to him, if any, lessening his power to earn money" has been held erroneous as allowing the recovery of double damages, the court saying: "Where a person is permanently injured, he may in addition to special damages, which must be alleged and proved, recover for the physical and mental suffering, and the permanent reduction of his power to earn money. In other words, the injuries to his person are measured by his pain and suffering, and the permanent reduction of his power to earn money. It is not contemplated that he shall receive damages 'for injuries to his person,' and in addition thereto damages for physical and mental suffering, and for the permanent reduction of his power to earn money. To do so is necessarily to allow double damages."⁶

An instruction that the jury may consider the plaintiff's loss of time with reference to his ability to earn money, the impairment of his capacity to earn money, whether temporary or permanent, disfigurement, and pain past or reasonably certain to be suffered in the future correctly states the law.⁷ An instruction that damages could not be recovered in excess of the sum claimed in the declaration is not prejudicial to the defendant, the court having also advised the jury that the sum claimed

⁵ Nashville, C. & St. L. R. Co. v. Banks, 156 Ky. 609.

⁶ Nashville, C. & St. L. Ry. v. Henry, 158 Ky. 88.

⁷ Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162, 57 L. ed. 170.

should not be taken as a criterion to act upon, but that it was only a limit beyond which they could not go.⁸

Where the court explicitly required the jury to find that there must be a proximate and causal relation between the damages and the negligence of the defendant, the fact that it referred to the amount sued for as the maximum amount which could be allowed is not erroneous.⁹

As in other actions the amount of the damages must depend in a large measure upon the good sense and sound judgment of the jury, upon all the facts and circumstances of the particular case. There can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time or the permanent injury to health and body.¹⁰

Neither the particular occupation in which the plaintiff was employed, nor the necessity for abandoning same need be averred to admit evidence thereof. Consequently if the plaintiff was engaged in business in addition to his employment, which on account of his injury he is required to abandon a recovery may be had although not specifically averred.¹¹ Evidence of impotency as the result of the injury is admissible although not specially pleaded.¹²

§ 1332. Damages in case of death; beneficiaries. The act provides that in case of the death of an employee from an injury sustained while he was engaged in interstate commerce, the railroad company shall be liable "to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him."

The supreme court has construed this provision to require that beneficiaries within any of the designated classes must have been dependent upon the deceased and that the words

⁸ *McDermott v. Severe*, 202 U. S. 600, 50 L. ed. 1162.

⁹ *Chesapeake & O. Ry. Co. v. Carnahan*, 241 U. S. 241, 60 L. ed. —.

¹⁰ *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591; *The "City of Panama"*, 101 U. S. 453, 25 L.

ed. 1061; *Opsahl v. Northern Pac. R. Co.*, 78 Wash. 197, 138 Pac. 681.

¹¹ *Wade v. Leroy*, 20 How. 34, 15 L. ed. 813.

¹² *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146.

"dependent upon him" do not refer to the next of kin alone.¹³ In other words this provision has been construed as though it read: The railroad company shall be liable to his personal representative for the benefit of his widow and children *dependent upon him*, if any, if none, then for his parents *dependent upon him*, if none, then for his next of kin dependent upon him.

The statute plainly intends that the beneficiaries shall take in the order named, and each class takes in the order named to the exclusion of the other; ¹⁴ hence parents of an employee are not beneficiaries where there is a surviving widow.¹⁵ To be dependents within the act the beneficiaries must at the time of the death of the decedent, have been dependent upon him for substantial if not entire support.¹⁶ There must be some reasonable expectation of pecuniary assistance or support, of which the beneficiaries were deprived,¹⁷ hence a married sister provided for by her husband is not "dependent" upon her brother merely because he contributed money to her in return for board and lodging, which was approximately worth the amount contributed; ¹⁸ nor can an adult sister claim to be dependent upon a brother whose wages were barely sufficient for his own maintenance.¹⁹ Self-supporting adult children, who contributed to

¹³ *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — *Tex. Civ. App.* —, 147 S. W. 1188. *Contra*, *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

¹⁴ *Leyhan v. Leyhan*, 47 Ind. App. 280, an action which did not arise under the act.

¹⁵ *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, rev'g — *Tex. Civ. App.* —, 148 S. W. 1099, 3 N. C. C. A. 800; *Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 6 N. C. C. A. 436, rev'g 144 N. Y. App. Div. 634.

¹⁶ *Southern Ry. Co. v. Vessell*, — Ala. —, 68 So. 336.

¹⁷ *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495; *Fogarty v.*

Northern Pac. R. Co., 85 Wash. 90.

Evidence that decedent, who was unmarried, and whose parents were dead, had contributed to his adult sister and her minor child held sufficient to form the basis of a recovery in their behalf. *Bruckshaw v. Chicago, R. I. & P. Ry. Co.*, — Iowa —, 155 N. W. 273.

¹⁸ *Southern Ry. Co. v. Vessell*, — Ala. —, 68 So. 336.

¹⁹ *Collins v. Pennsylvania R. Co.*, 163 N. Y. App. Div. 452. In this case the decedent was eighteen years of age and earned but five or six dollars per week. He and an adult sister earning \$15 per week pooled their wages and out of the sum total supported themselves and an invalid sister.

the family expenses cannot be considered dependents.²⁰ The mere physical disability of a brother does not render him a dependent in the absence of evidence showing reasonable ground for belief that deceased would have contributed to his support.²¹

It has been held that pecuniary loss by the parents from the death of an adult son was sufficiently shown where the evidence disclosed that the parents were in need of financial assistance; that the deceased had during his minority and for two years in addition given such aid both in money and in work, and that he had the disposition to continue the same as evidenced by the contribution of a portion of his wages.²² In an action in behalf of the surviving mother of the decedent, proof that she had a reasonable expectation of pecuniary benefit from a continuance of the decedent's life is sufficient.²³

The period of dependency of a minor child, under ordinary circumstances ends upon the attainment of his majority, hence mere expectation founded upon the expressed wishes of the father to give him an education which would necessarily continue for a considerable period after he became of age, cannot form the basis of a claim of pecuniary loss as to the time following his attainment of majority.²⁴ The pecuniary loss of a mentally defective child growing out of the death of its father is necessarily greater than the loss to children not so afflicted.²⁵

The action is not for the equal benefit of each of the surviving relatives in whose behalf the suit is brought, and though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary

²⁰ *Houston & T. C. R. Co. v. Walker*, — Tex. —, 173 S. W. 208.

²¹ *Jones v. Charleston & W. O. R. Co.*, 98 S. C. 197.

²² *Lundeen v. Great Northern R. Co.*, 128 Minn. 332.

²³ *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

²⁴ *McGarvey's Guardian v. McGarvey's Adm'r*, 163 Ky. 242.

²⁵ *Louisville & N. R. Co. v. Stewart's Adm'r*, 163 Ky. 823, aff'd 241 U. S. 261, 60 L. ed. —, where a verdict for \$4,469 in favor of a child six years old, suffering from a mental affliction was held not to be excessive.

loss.²⁶ The interest of a beneficiary who dies before the recovery of judgment will not survive.²⁷

The recovery by the personal representatives is in trust for the designated beneficiaries.²⁸ Where the injuries to an employee resulted in his death the original act of 1908 created a new and independent cause of action in favor of his personal representatives for the pecuniary loss suffered by the beneficiaries on account of such death.²⁹

Does the physical existence of beneficiaries of the preferred class as named in the act, who are incapable of taking because not dependent upon the deceased, prevent compensation to beneficiaries of subordinate classes who were in fact dependent upon the deceased? Obviously not, unless indeed the construction placed upon the act by the supreme court is to be emasculated. Assume that a deceased employee left surviving him, as sole representatives of the first class, adult sons who were self-supporting and in no way dependent upon him, and as beneficiaries of the second class, aged and indigent parents, who were wholly dependent upon him, and who, from his contributions in the past, might justly anticipate the continuance of his bounty had he survived. Are the parents to be deprived of a remedy merely because of the existence of beneficiaries of the first class, who could not recover because of lack of dependency?

In the light of the construction placed upon the act by the supreme court this provision can only be construed as meaning that beneficiaries of the subsequent classes can take only when there is no beneficiary of the prior classes dependent upon the deceased.

A similar question was presented in an action arising under the Indiana Death Act, which gives a right of action to the personal representative for death caused by wrongful act or omis-

²⁶ *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — Tex. Civ. App. —, 147 S. W. 1188.

²⁷ *Gulf, C. & S. F. Ry. Co. v. Higginbotham*, — Tex. Civ. App. —, 173 S. W. 482. This case did not arise under the Federal Employers'

Liability Act, but unquestionably the rule is the same.

²⁸ *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, rev'g 112 Ark. 305.

²⁹ *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

sion, provided that the damages "must inure to the exclusive benefit of the widow or widower as the case may be, and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."³⁰ The deceased left surviving him adult children who were in no way dependent upon him, and minor children of a deceased child who were dependents. It was held that the grandchildren of the decedent "were not 'children' and do not stand for or represent 'children' in the sense in which that word is used in this statute, but they may be beneficiaries under the statute, indicated therein by the words 'next of kin.'"

In holding that recovery might be had for the benefit of the grandchildren, notwithstanding the existence of children, who could not recover because not dependent, the court said: "The right of action accrues upon the death of the intestate. Unless at that time, and at the commencement of the action, and also at the time of awarding the damages, there be living some person, or persons, related to the decedent of whom it can be said that the law implies damages from the death of the plaintiff's decedent, or who may be said to have suffered pecuniary loss through his death, there can be no recovery under the statute (*Dillier v. Cleveland, etc.*, 34 Ind. App. 52); but if, as in the case at bar, the decedent left no widow, but left surviving him children who were not pecuniarily injured by his death, and there were not existing at his death any beneficiary of the first class, but there were, at the time of his death, and at the time of the trial, beneficiaries of the second class, being 'next of kin,' who were in fact pecuniarily injured by his death, such next of kin come within the intention of the Legislature in designating the beneficiaries for whom the action may be maintained. The three minor grandchildren so dependent upon their grandfather should stand in no worse condition than if the decedent had left surviving him neither a widow or children. He left no widow, and the children who survive him were not beneficiaries. In the absence of beneficiaries of the first class who have suffered pecuniary loss, the damage should go to the 'next

³⁰ Burns' Ann. St. 1908, § 285.

of kin' shown to have suffered loss as contemplated by the statute, and the decisions of the court construing it." ³¹

The fact that the person for whose benefit the action is brought is a nonresident alien does not preclude recovery. ³²

The act is silent as to who are to be considered the next of kin of a deceased employee. It is now settled that the question must be determined in accordance with the local law, ³³ hence the common law and statutes of the various states form the sole guide. In passing upon the question, the Supreme Court of the United States said:

"Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various states to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law. But it is urged as 'next of kin' was a term well known at common law, it is to be presumed that the words were used as having their common law significance and therefore as excluding all persons not included in the term under the common law, meaning, of course, the law of England as it existed at the time of the separation from the mother country. Leaving aside the misapplication of the rule of construction relied upon, it is obvious that the contention amounts to saying that Congress by the mere statement of a class, that is next of kin, without defining whom the class embraces, must be assumed to have overthrown the local law of the states, and substituted another law for it, when conceding that there was power in Congress to do so, it is clear that no such extreme result could possibly be attributed to the act of Congress without express and unam-

³¹ *Pittsburgh, C., C. & St. L. R. Co. v. Reed*, 44 Ind. App. 635. 128 Minn. 112, aff'd 241 U. S. 211, 60 L. ed. —.

³² *McGovern v. Philadelphia & R. R. Co.*, 235 U. S. 389, 59 L. ed. 283, 8 N. C. C. A. 67, rev'g 209 Fed. 975; *Bombolis v. Minneapolis & St. L. R.*

³³ *Seaboard Air Line Ry. v. Kenney*, 240 U. S. 489, 60 L. ed. —, aff'g 167 N. C. 14.

biguous provisions rendering such conclusion necessary. The truth of this view will be made at once additionally apparent by considering the far-reaching consequence of the proposition since if it be well founded, it would apply equally to the other requirements of the statute—to the provisions, as to the surviving widow, the husband and children, and to parents, thus for the purposes of the enforcement of the act overthrowing the legislation of the states on subjects of the most intimate domestic character and substituting for it the common law as stereotyped at the time of the separation. The argument that such result must have been intended since it is to be assumed that Congress contemplated uniformity, that is, that the next of kin entitled to take under the statute should be uniformly applied in all States after all comes to saying that it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity as to many others.”³⁴

The term “next of kin” as used in statutes ordinarily refers to those who take the personal estate of the decedent under the statutes of distribution.³⁵ The Illinois Death Act providing for a recovery for the widow and next of kin has been construed as referring to next of kin in a technical sense, and cannot be limited to certain degrees of consanguinity.³⁶ “If,” said the court, “the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been pecuniary loss for which under the statute compensation must be given.”³⁷ The words “next of kin” in the Kansas Death Act have been construed to mean those who inherit from the deceased under the statute of descent and distribution.³⁸

³⁴ *Seaboard Air Line Ry. v. Kenney*, 240 U. S. 489, 60 L. ed. —, aff'g 167 N. C. 14.

³⁵ *In re Weaver's Estate*, 140 Iowa 615.

³⁶ *Chicago & A. R. Co. v. Shan-non*, 43 Ill. 338; *Chicago, P. & St. L. R. Co. v. Woolridge*, 174 Ill. 330, rev'g 72 Ill. App. 551; *Dukeman*

v. Cleveland, C. C. & St. L. R. Co., 237 Ill. 104, aff'g 142 Ill. App. 622.

³⁷ *Chicago & A. R. Co. v. Shan-non*, 43 Ill. 338.

³⁸ *Bolinger v. Beacham*, 81 Kan. 746; *Atchison, T. & S. F. Ry. Co. v. Ryan*, 62 Kan. 682. It is noteworthy, however, that the Kansas Act provides for distribution “in

In an action under the act it was held by a state court that where under the state law illegitimate children by the same mother are legitimate as between themselves, an action for the death of an illegitimate child may be maintained in behalf of his brothers and sisters by that same mother, she being dead.³⁹ This decision was subsequently affirmed by the Supreme Court of the United States⁴⁰ where it was further urged that under such a construction of the act the right should have been recognized to seek to trace the paternity of the illegitimate child so as to make the asserted father the "parent" under the statute. This contention was disposed of on two grounds: (1) "Because it was necessarily foreclosed by the ruling of the court below as to the state law concerning the next of kin and the right of the brothers and sister of the illegitimate child to inherit from him solely because of a common motherhood, a ruling which excluded by necessary implication the right now contended for;" and (2) "because, as no provision, either of the state law or of the common law, supporting the asserted right is referred to, the suggestion may be taken as simply a typical illustration of the confusion of thought involved in the main proposition relied upon which we have previously adversely disposed of."

Although the act specifically mentions "children" and "parents" as beneficiaries, the question as to the status of adopted children or foster parents must unquestionably be determined in accordance with the state law. As previously pointed out the United States Supreme Court has declared that the question as to who are next of kin must be decided in the light of the local law. The words "parents" and "children" unquestionably have a well defined meaning at common law, but so also has the term "next of kin." The legislature has the undoubted power to declare that under certain circumstances persons other than the

the same manner as personal property of the deceased."

³⁹ *Kenney v. Seaboard Air Line Ry.*, 167 N. C. 14, aff'd 240 U. S. 489, 60 L. ed. —. It is worthy of note, however, in connection with this case that the decision of the

majority was vigorously dissented from by two of the five justices constituting the court.

⁴⁰ *Seaboard Air Line Ry. v. Kenney*, 240 U. S. 489, 60 L. ed. —, aff'g 167 N. C. 14.

natural progenitors or offspring shall be regarded as "parents" or "children" as the case may be. Having done so, such a declaration should be regarded as a definition of the terms "parents" or "children," as used in the Federal Employers' Liability Act to the same extent that a legislative declaration that illegitimates shall be regarded as next of kin under certain circumstances is upheld.

Under such a construction the question as to whether a recovery may be had under the act by either the natural or foster parent of an adopted child for its death, or by an adopted child for the death of the natural or foster parent would depend solely upon the status and rights of the respective persons under the state law, and the same is true as to the collateral kindred by the blood or by adoption.

Probably in most states a recovery is permitted in behalf of adopted children for the death of the foster parent; but the converse is not true. The right of the adopting parent to recover for the death of the foster child depends upon whether such right is conferred by statute, as it does not exist at common law. As such statutes are strictly construed, the right must be clearly granted, and the fact that a right of action for the death of the foster parent is conferred upon the child does not *per se* extend a similar right to the parent to recover for the death of the child.⁴¹ An adopting parent cannot recover for the death of his foster child under the New Jersey Act.⁴²

Apparently the provisions of the Adoption Act must be strictly complied with, it being held in one case that where a foster father brought suit for the death of his adopted child and upon his death the action was continued by the foster mother, there could be no recovery by the latter where it was shown that she had not acknowledged the deed of adoption as her free act and deed, although her husband had properly executed the deed and

⁴¹ *Boswell v. Lake Shore Elec. Ry.*, 35 Ohio Cir. Ct. 522, 10 N. C. C. A. 743; *Mount v. Tremont Lumber Co.*, 121 La. 64, 16 L.R.A. (N.S.) 199, 126 Am. St. Rep. 312, 15 Ann. Cas. 148.

⁴² *Heidecamp v. Jersey City, H. & P. St. R. Co.*, 69 N. J. L. 284.

she had signed it.⁴³ Such a ruling would seem to carry the doctrine of strict compliance to the border at least, if not beyond the limits of common sense.

Even though an adoption act confers upon both the foster parents and an adopted child the same rights as if the child had been born in wedlock, such rights do not extend to other kindred not covered by the statute, hence an adopted child cannot inherit from kindred of the adopting parents by right of representation.⁴⁴ This being true, unquestionably an adopted child is not "next of kin" to relatives of its parents either direct or collateral, irrespective of the question of dependency, nor are such relatives "next of kin" to the child. But the New York courts have held, in construing the Adoption Act of that state which provides that the heirs and next of kin of the adopted child shall be the same as if he were the "legitimate child" of the person adopting, that the legislature "clearly used the words 'legitimate child' in the well-established meaning of the term as a child born in lawful wedlock, and effectively embodied in the law of descent a provision that the adopted child was the heir at law and next of kin of the adoptive parent to the same extent as though the adoptive parent in this case had borne the adopted child." A recovery was therefore permitted in behalf of the brothers and sisters of the intestate's foster mother.⁴⁵

§ 1333. Same subject; measure and elements of damages. The right of action for death is dependent upon the existence of such a right in the decedent if he had survived his injuries,⁴⁶ and the question of survival can only be determined in the light of the federal act. Recourse cannot be had to a state statute.⁴⁷ The right of action provided for in the original act is grounded

⁴³ *Sarazin v. Union R. Co.*, 153 Mo. 479.

⁴⁴ *Van Derlyn v. Mack*, 127 Mich. 146; *Moore v. Moore's Estate*, 35 Vt. 98. See also *Delano v. Bruerton*, 148 Mass. 619, 2 L.R.A. 698; *Keegan v. Geraghty*, 101 Ill. 26.

⁴⁵ *Carpenter v. Buffalo General Stuh. Dam. Vol. V.—17.*

Elec. Co., 213 N. Y. 101, aff'd 155 App. Div. 655.

⁴⁶ *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

⁴⁷ *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. 494, aff'd 223 U. S. 1, 56 L. ed. 327, 1 N. C. C. A. 875.

upon an original wrongful injury to the person for the exclusive benefit of the beneficiaries named in the act, and permits the recovery of such damages as flow from the pecuniary benefits which the beneficiaries might reasonably have received if the decedent had survived.⁴⁸ And so far as it relates to the independent right of action growing out of the wrongful death, as distinguished from the survival of the decedent's right of action for personal injury where death was not instantaneous, this is also true under the amendment of 1910.

While the word "pecuniary" does not appear in the act, the supreme court, in conformity with the uniform construction given the Lord Campbell Act, and similar statutes, has interpreted it as providing compensation for pecuniary loss or damage only.⁴⁹ "A pecuniary loss or damage," says the supreme court, "must be one which can be measured by some standard. It is a term employed judicially not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation."⁵⁰ The loss of the society and companionship of the decedent not being capable of pecuniary admeasurement cannot, therefore, form an element of damages.⁵¹

No hard and fast rule by which pecuniary damages may in all cases be measured is possible,⁵² and the rule for the measurement of damages must differ according to the relation between

⁴⁸ *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

⁴⁹ *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495; *American R. Co. of Porto Rico v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, rev'g 5 Porto Rico Fed. Rep. 401, 427; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — *Tex. Civ. App.* —, 147 S. W. 1188; *Kansas City Southern*

R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, rev'g 112 Ark. 305.

⁵⁰ *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495, quoting from *Patterson Railway Law*, § 401.

⁵¹ *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495; *American R. Co. of Porto Rico v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, rev'g 5 Porto Rico Fed. Rep. 401, 427.

⁵² *Michigan Cent. R. Co. v. Vree-*

the parties beneficially interested and the decedent, the pecuniary damages suffered being proportionate to the degree of dependency upon the deceased.⁵³ Thus the word "pecuniary" as judicially interpreted is not so narrow as to exclude damages for the loss of services of the husband, wife or child,⁵⁴ and where the beneficiary is a child, recovery may be had for the care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.⁵⁵

The measure of recovery is not the amount necessary to provide means of caring for, educating and properly training the dependent children, but the amount which deceased in view of the evidence might reasonably be expected to have contributed toward that end.⁵⁶ Bearing in mind that only the pecuniary loss suffered by the surviving dependents is recoverable, the importance of the distinction becomes apparent.

In an action in behalf of minor children of a deceased employee the measure of damages is the pecuniary loss to the dependent children; that is, such an amount as the deceased would reasonably be expected under all the facts and circumstances in the case to have contributed towards the maintenance and education of such children.⁵⁷ Compensation does not include damages by way of recompense for grief or wounded failings.⁵⁸

The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary.⁵⁹ Funeral expenses are not recoverable.⁶⁰

The fact that decedent survived his injuries for an appreci-

land, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

⁵³ Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

⁵⁴ Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

⁵⁵ Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

⁵⁶ Kansas City, M. & O. Ry. Co.

v. Roe, — Okla. —, 150 Pac. 1035.

⁵⁷ Kansas City, M. & O. Ry. Co. v. Roe, — Okla. —, 150 Pac. 1035.

⁵⁸ Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

⁵⁹ Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

⁶⁰ Collins v. Pennsylvania R. Co., 163 N. Y. App. Div. 452.

able period does not render the loss of future earnings a proper element of damages.⁶¹

State limitations upon the amount of recovery in action for wrongful death do not control,⁶² since the act supersedes all state regulations within its sphere.

Since the damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits which would have resulted from the continued life of the deceased, the earning power of a lump sum awarded by the jury must be considered. It is obvious that a sum of money presently paid in cash is of much greater value than the payment of the same aggregate in instalments through a period of years. The present value, therefore, of the expected future contributions of the decedent is the measure of recovery. In arriving at this conclusion, the Supreme Court of the United States said:

"The putting out of money at interest is at this day so common a matter that ordinarily it cannot be excluded from consideration in determining the present equivalent of future payments, since a reasonable man, even from selfish motives, would probably gain some money by way of interest upon the money recovered. Savings banks and other established financial institutions are in many cases accessible for the deposit of moderate sums at interest, without substantial danger of loss; the sale of annuities is not unknown; and, for larger sums, state and municipal bonds and other securities of almost equal standing are commonly available.

"Local conditions are not to be disregarded, and besides, there may be cases where the anticipated pecuniary advantage of which the beneficiary has been deprived covers an expectancy so short and is in the aggregate so small that a reasonable man could not be expected to make an investment or purchase an annuity with the proceeds of the judgment. But, as a rule, and in all cases where it is reasonable to suppose that interest may

⁶¹ *Jorgenson v. Grand Rapids & I. Ry. Co.*, — Mich. —, 155 N. W. 535.

⁶² *Chicago, R. I. & P. Ry. Co. v. Devine*, 239 U. S. 52, 60 L. ed. —, aff'd 266 Ill. 248, which affirms 185

Ill. App. 488; *Devine v. Chicago, R. I. & P. Ry. Co.*, 185 Ill. App. 488, aff'd 266 Ill. 248, which is affirmed by 239 U. S. 52, 60 L. ed. —.

safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

"We do not mean to say that the discount should be at what is commonly called the 'legal rate' of interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits; it being a matter of common knowledge that, as a rule, the best and safest investments, and those which require the least care, yield only a moderate return."⁶³

The difficulty on the part of the average jurymen in calculating the present cash value of future payments involving the computation of interest on deferred payments with annual rests was recognized by the court which refused to approve of any particular formulae for the determination of the question, holding that, like other questions of procedure and evidence, it was to be determined in accordance with the law of the forum.

As in other actions the amount to be awarded is a question for the jury under proper instructions from the court, and unless prejudice and passion are clear, their discretion will not be interfered with. On the whole, the amounts awarded are probably considerably in excess of the average verdicts in actions under state death acts, which of course in many states are limited. Verdicts for very large amounts have been sustained.⁶⁵ As will be shown elsewhere, the excessiveness of the

⁶³ Chesapeake & O. R. Co. v. Kelly's Adm'r, 241 U. S. 485, rev'g 160 Ky. 296, 161 Ky. 655.

⁶⁵ Verdict for \$15,000 not excessive for death of switchman thirty-

seven years of age. Devine v. Chicago, R. I. & P. Ry. Co., 185 Ill. App. 488, aff'd 266 Ill. 248, which is affirmed by 239 U. S. 52, 60 L. ed.

verdict does not present a federal question, and hence is not reviewable by the Supreme Court of the United States on error to a state court.⁶⁶

Where the evidence shows that the relations between the deceased and his father were affectionate and that he had contributed toward the latter's support, the jury may infer that he would continue to do so.⁶⁷

§ 1334. **Same subject; recovery for pain and suffering of decedent.** The original act of 1908 was analogous to the English Death Act, usually known as Lord Campbell's Act, and, hence, prior to the amendment of 1910 the right of action created in favor of an injured employee did not survive his death.⁶⁸ No recovery could be had, therefore, for the pain and

Verdict for \$19,011 for the death of an engineer who had earned \$192 per month, and whose life expectancy was 22 years, apportioned among the widow and five children whose ages varied from 3 to 16 years held not excessive. *Chesapeake & O. R. Co. v. Kelly's Adm'x*, 160 Ky. 296.

A verdict for \$22,750 for the death of a foreman earning \$105 who contributed to his wife from \$90 to \$95 monthly is excessive and a reduction to \$15,000 was within the discretion of the court. *Millette v. New York, W. & B. R. Co.*, 169 N. Y. App. Div. 126.

Verdict for \$6,000 for death of adult son, leaving surviving him a father, whose age was 51 years and whose expectancy was 20.20 years, and a mother 48 years of age with an expectancy of 22.36 years, held excessive to the extent of \$2,000 decedent having contributed but \$400 to his parents during the five years preceding his death. *Denver v. Atchison, T. & S. F. R. Co.*, 96 Kan. 154.

Award of \$7,000 not excessive for death of employee in good health,

47 years of age, frugal and industrious in habits, and who although incapacitated from pursuing his former occupation as locomotive engineer, on account of deafness, could have secured employment in other work earning as high as \$125 per month. *St. Louis Southwestern Ry. Co. v. Wilson*, — Ark. —, 177 S. W. 415.

A verdict for \$8,000 in favor of the widow and \$4,000 each in favor of three minor children for the death of the husband and father who at the time of his death was 37 years of age and earned a little more than \$54 per month is not excessive. *San Antonio & A. P. Ry. Co. v. Littleton*, — Tex. Civ. App. —, 180 S. W. 1194.

⁶⁶ See *infra*, § 1358.

⁶⁷ *Saunders v. Southern R. Co.*, 167 N. C. 375.

⁶⁸ *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495; *American R. Co. of Porto Rico v. Didricksen*, 227 U. S. 145, 57 L. ed. 456; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — Tex. Civ. App. —, 147

suffering of the deceased.⁶⁹ This defect, however, was remedied by the amendment of 1910, which provides that: "Any right of action given by this act to a person suffering injury shall survive to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."⁷⁰

Recovery may now be had for the conscious pain and suffering of the decedent following the infliction of the injury which subsequently resulted in his death.

Obviously there can be no recovery for pain and suffering where death was instantaneous,⁷¹ nor for pain and suffering which are substantially contemporaneous with death or merely an incident thereto,⁷² and short periods of insensibility intervening between a fatal injury and death do not afford a basis for a separate estimate or award of damages for pain and suffering;⁷³ but where there was evidence from which the jury could reasonably find that after the injury the decedent endured conscious pain and suffering as a result of his injury, although the time elapsing between the injury and death may have been very brief, their finding will not be disturbed.⁷⁴ Accordingly where it was shown that decedent's injury was one calculated to cause extreme pain and suffering, if he remained conscious, and there was evidence that he groaned and endeavored to free himself while a car was being lifted from his body, a recovery for conscious pain and suffering was sustained by the United States

S. W. 1188; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, rev'g 98 Ark. 240.

⁶⁹ *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495; *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. 494, aff'd 223 U. S. 1, 56 L. ed. 327, 1 N. C. C. A. 875.

⁷⁰ Section 9, Act of Apr. 5, 1910.

⁷¹ *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

⁷² *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

⁷³ *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

⁷⁴ *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

Supreme Court although death intervened but little more than a half hour after the injury.⁷⁵ The court, however, characterized it as a case close to the border line.

Under the doctrine of the supreme court the decision of the Minnesota court that recovery may be had for pain and suffering if the decedent lived an "appreciable" length of time after the injury, is erroneous.⁷⁶ It seems to have been predicated upon the rule prevailing in some states that survival for but a single moment preserves the decedent's cause of action,⁷⁷ and that the survival of the action depends not upon the consciousness or sensibility of the injured person, but upon the continuance of life after the infliction of the injury, however brief the period.⁷⁸ That this is not the rule under the federal act is definitely settled by the Supreme Court of the United States.

As in other cases the determination of the amount to be awarded rests with the jury, but while no standard of admeasurement is possible their finding must not be arbitrary.⁷⁹

In an action to recover for the conscious pain and suffering of the deceased and the pecuniary loss suffered by the beneficiaries on account of his death, the jury cannot be required to assess separately the amount awarded on each cause of action, especially is this true where in harmony with local practice.⁸⁰

⁷⁵ *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, *aff'd* 115 Ark. 483.

⁷⁶ *Capital Trust Co. v. Great Northern R. Co.*, 127 Minn. 144, 7 N. C. C. A. 154. This decision is particularly obnoxious as the decedent lived but ten minutes after the injury was inflicted and was unconscious during the entire period.

⁷⁷ *Kellow v. Central Iowa Ry. Co.*, 68 Iowa 470.

⁷⁸ *St. Louis, I. M. & S. Ry. Co. v. Dawson*, 68 Ark. 1; *Hollenbeck v. Berkshire R. Co.*, 9 Cush. (Mass.) 478; *Bancroft v. Boston & W. R. Corporation*, 11 Allen (Mass.) 34;

Tully v. Fitchburg R. Co., 134 Mass. 499; *Oliver v. Houghton Co. St. R. Co.*, 134 Mich. 367; *Ely v. Detroit United Ry.*, 162 Mich. 287; *Beeler v. Butte & L. Copper Development Co.*, 41 Mont. 465.

⁷⁹ A verdict for \$11,000 for conscious pain and suffering where decedent survived his injury for about half an hour held excessive and reduced to \$5,000. *St. Louis, I. M. & S. R. Co. v. Craft*, 115 Ark. 483, *aff'd* 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754.

⁸⁰ *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, *rev'd* 112 Ark. 305.

§ 1335. **Same subject; extraneous circumstances as affecting recovery.** The possession of property or independent means contributing to support does not necessarily deprive one of the status of a beneficiary;⁸¹ so, too, the fact that the beneficiary collected insurance upon decedent's life cannot be considered in mitigation of damages, and evidence thereof is incompetent.⁸²

Although no contributions for support had actually been made by the deceased, the legal liability to support possesses a pecuniary value capable of admeasurement, and when coupled with proof of earning capacity sufficient to sustain the enforcement of that duty, may form the basis of a recovery.⁸³ Hence the mere fact that deceased long prior to his death had abandoned his wife and child does not bar a recovery in their behalf, it being shown that his earnings were sufficient to have supported them, since under the law his legal duty to support his family could have been enforced.⁸⁴ And this is true as to minor children although the parents have been divorced, there having been no award of alimony.⁸⁵ At most, such a separation can be considered in mitigation of damages.⁸⁶ However, where subsequent to the separation the wife leads such a dissolute life as to absolve the husband from the duty to support her, recovery in her behalf is barred.⁸⁷

In actions not arising under the act the remarriage of the widow has been held not to affect nor to diminish the amount

⁸¹ *Richelieu v. Union Pac. R. Co.*, 97 Neb. 360, where a sister was held to be a dependent within the act although possessed of the family homestead renting for \$30 per month, and \$9 per week received from a clerical position.

⁸² *Brabham v. Baltimore & O. R. Co.*, 136 C. C. A. 117, 220 Fed. 35, where the admission of such evidence was held prejudicial although the beneficiary was permitted to testify that the amount of insurance received was used to pay burial expenses and certain debts.

⁸³ *Fogarty v. Northern Pac. R. Co.*, 85 Wash. 90; *McGarvey's*

Guardian v. McGarvey's Adm'r, 163 Ky. 242.

⁸⁴ *Fogarty v. Northern Pac. R. Co.*, 85 Wash. 90; *Dunbar v. Charleston & W. C. Ry. Co.*, 186 Fed. 175; *McGarvey's Guardian v. McGarvey's Adm'r*, 163 Ky. 242; *Boos v. Minneapolis, St. P. & S. S. M. R. Co.*, 127 Minn. 381.

⁸⁵ *McGarvey's Guardian v. McGarvey's Adm'r*, 163 Ky. 242.

⁸⁶ *Fogarty v. Northern Pac. R. Co.*, 85 Wash. 90.

⁸⁷ *Fogarty v. Northern Pac. R. Co.*, 85 Wash. 90; *Ft. Worth & D. C. Ry. Co. v. Floyd* (Tex. Civ. App.), 21 S. W. 544; *Boos v. Minne-*

which she would otherwise be entitled to recover had she remained unmarried.⁸⁸ The rule is a sound one and probably would apply to actions under the act since remarriage merely affects the widow's present dependency and not the financial loss which she has suffered on account of her husband's death. So also evidence that since the death of her husband the widow had become engaged to marry is inadmissible.⁸⁹

§ 1336. **Same subject; joinder of actions for pain and suffering and pecuniary loss.** Prior to the amendment of 1910 a cause of action for conscious suffering on the part of the deceased could not be joined with the personal representative's cause of action for the wrongful death.⁹⁰ But since that amendment, an action for pain and for pecuniary loss involves two distinct rights of action,⁹¹ and recovery may now be had in a single action for the conscious pain and suffering of the deceased and the pecuniary loss suffered by his beneficiaries on account of his death.⁹²

The administrator suing for both the pain and suffering of the deceased and the pecuniary loss of the next of kin cannot be required to elect as to which cause of action he will proceed upon,⁹³ but may join both causes of action in a single action and recover for both.⁹⁴

§ 1337. **Same subject; instructions.** Instructions upon the amount recoverable for death must, of course, present to the jury correct principles governing the measure of damages,⁹⁵

apolis, St. P. & S. S. M. R. Co., 127 Minn. 381.

⁸⁸ *Archer v. Bowling*, 166 Ky. 139, citing *Georgia Railroad & Banking Co. v. Garr*, 57 Ga. 277, 24 Am. Rep. 492; *Davis v. Guarnjeri*, 45 Ohio St. 470, 4 Am. St. Rep. 548.

⁸⁹ *Jones v. Kansas City Southern R. Co.*, 137 La. 178, rev'd on other grounds, 241 U. S. 181, 60 L. ed. —.

⁹⁰ *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. 494, aff'd 223 U. S. 1, 56 L. ed. 327, 1 N. C. C. A. 875.

⁹¹ *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed.

1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

⁹² *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, rev'g 112 Ark. 305.

⁹³ *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263.

⁹⁴ *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

⁹⁵ An instruction that the measure of damages "is the present worth of the amount which it is reasonably probable the deceased would have contributed to the sup-

and should clearly limit the damages recoverable to pecuniary loss.⁹⁶ Thus an instruction that the jury "should not act either miserly or with reckless extravagance, but should assess such an amount as your own good judgment tells you would provide the means of caring for, educating and properly training the children of the deceased" is erroneous since it is not based upon the theory of pecuniary loss; in other words, the amount which it might reasonably be expected the deceased would contribute to those purposes.⁹⁷ The court may charge the jury that they may take into consideration the care, attention, instruction, training, advice and guidance which the evidence showed the decedent might reasonably have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed,⁹⁸ but it is erroneous to permit the jury to consider the loss of companionship and association as an element of damages.⁹⁹

An instruction is erroneous which permits the jury to assess such "sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from decedent's death to his widow and child, and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. From the amount thus ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover, if your verdict should be for the plain-

port of his parents during the whole expectancy of life in proportion to the amount he was contributing, if any, at the time of his death, not exceeding his expectancy of life" was held, at most, obscure and not positively erroneous because of the use of the word "whole," nor, as allowing recovery for probable contributions during the entire period of deceased's expectancy. *Louisville*

& N. R. Co. v. Fleming, — Ala. —, 69 So. 125.

⁹⁶ *Culp v. Virginian Ry. Co.*, — W. Va. —, 87 S. E. 187.

⁹⁷ *Kansas City, M. & O. Ry. Co. v. Roe*, — Okla. —, 150 Pac. 1035.

⁹⁸ *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. ed. 392, 7 N. C. C. A. 814, rev'g 131 C. C. A. 621, 215 Fed. 687.

⁹⁹ *New York, C. & St. L. R. Co. v.*

tiff.”¹ The error in this instruction is patent, as it predicates recovery upon the decedent’s earning capacity instead of upon his probable contributions to his beneficiaries.

An instruction that the jury might consider the relationship between the decedent and his widow, and drawing upon their experiences as men, measure as far as they could, what it would reasonably have been worth to the widow “in dollars and cents to have had, during their life together, had he lived, the care and advice” of her husband, is erroneous since it does not confine the jury to a consideration of the financial benefits which might reasonably have been expected from the decedent in a pecuniary way.²

A charge that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries are adults or dependents who were mere “next of kin,” is erroneous.³ An instruction has been held proper which permitted the jury to “take into consideration the increasing wants of the parents by reason of advancing age and the increasing ability of the son to supply those wants, should you find such to be the case.”⁴ The propriety of such an instruction under the rules laid down by the federal courts may be seriously questioned. While mathematical exactitude cannot be expected, to inject elements of such a nature into the consideration of the question involves the determination of possibilities and probabilities which can have no basis except speculation and conjecture.

An erroneous instruction on damages may be harmless where the amount of the verdict indicates lack of prejudice.⁵

Niebel, 131 O. C. A. 248, 214 Fed. 952.

¹ Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, rev’g 112 Ark. 305.

² Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev’g 189 Fed. 495.

³ Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, 59 L. ed. 392,

7 N. C. C. A. 814, rev’g 131 C. C. A. 621, 215 Fed. 687.

⁴ Louisville & N. R. Co. v. Fleming, — Ala. —, 69 So. 125. This instruction was claimed to be erroneous for want of evidence to support it.

⁵ Instruction authorizing the jury to consider “the care and attention, instruction and training, if any,

§ 1338. Same subject; apportionment of damages. The apportionment of the amount awarded among the various beneficiaries for whose benefit the action is brought is for the jury.⁶ But the act does not specifically require the jury to apportion the damages among the beneficiaries, and their failure to do so is not reversible error.⁷ But where the plaintiff sues for one not entitled to share in the recovery, and whose improper inclusion might increase the amount of the recovery, the defendant may raise the question in such mode as may be appropriate under the practice of the court in which the trial is had, so as to secure a ruling which will prevent a recovery in behalf of one not entitled to share therein.⁸

In view of the decision of the supreme court that the jury need not in all cases apportion the amount awarded among the beneficiaries, that duty must necessarily devolve upon the court, probably in most cases upon the probate court, where the jury has failed to act. But while the deliberations of the jury are secret, and they are under no particular obligation to account for the methods followed in making their apportionment, the task of the court is not always an easy one. Under such circumstances the rule followed by the Kentucky Court of Appeals merits the highest commendation. In the case presented the decedent had married twice, his first wife having secured a divorce and having been awarded the custody of their son, who was a minor seventeen years of age at the time of his

one of Rodger's disposition and capacity, as shown by the evidence, might reasonably be expected to give his wife and children, which was lost to them by his death" construed as referring to the children so far as training was concerned and in any event harmless where the amount of the verdict was less than the jury might have allowed for the pecuniary loss of the widow and children. St. Louis, I. M. & S. R. Co. v. Rodgers, 118 Ark. 263.

⁶ Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785,

3 N. C. C. A. 806, rev'g — Tex. Civ. App. —, 147 S. W. 1188.

⁷ Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330, distinguishing Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — Tex. Civ. App. —, 147 S. W. 1188. *Contra*, Fogarty v. Northern Pac. R. Co., 74 Wash. 397.

⁸ Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330.

father's death. An action to recover for his death, under the act, was compromised by the administrator and on a contest between the son's guardian and the administrator, the former claimed that in view of the father's expressed wish that his son should receive a medical education, which would require six years, his pecuniary loss should be measured by the period required to give him such an education. On the other hand, the widow claimed that her period of pecuniary loss should be measured by her life expectancy. The court refused to adopt either contention, holding that the son's pecuniary loss would terminate when he attained his majority, while that of the widow could not continue longer than the life expectancy of the deceased, and the recovery should be divided upon the basis of their respective periods of pecuniary loss.⁹

This rule furnishes a sound basis for apportionment in practically all cases, the maximum period of dependency being the life expectancy of the deceased, and the lesser periods being determined in the light of the time when dependency from minority, physical incapacity, and the like, would terminate, the pecuniary loss of the particular beneficiaries being proportionate to the period of reasonably anticipated dependency. However, it must be borne in mind that the application of the rule assumes that the pecuniary loss of all beneficiaries per annum is the same. Cases frequently arise where the pecuniary loss to one beneficiary is greater than the loss to others, thus the pecuniary loss to an infant of tender years should not be placed upon the same plane as the loss to a minor approaching majority. Similarly physical incapacity upon the part of one of the beneficiaries may affect the equable division of the proceeds of the recovery. In such cases reason would dictate that the proportionate loss per annum of the different beneficiaries should first be determined, after which their rights in the gross sum may be adjusted in accordance with their respective periods of dependency.

The jury is not required to apportion damages awarded for pain and suffering and for pecuniary loss.¹⁰

⁹ *McGarvey's Guardian v. McGarvey's Adm'r*, 163 Ky. 242.

¹⁰ *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263.

§ 1339. Same subject; distribution of the amount recovered.

Since the amount recovered by the personal representative of the decedent is for the benefit of the next of kin, as provided in the act,¹¹ the fund so collected does not become an asset of the estate, and the administrator is not entitled to commissions thereon,¹² and where the attorneys for the administrator paid the amount collected over to the sole beneficiary, such administrator cannot maintain a rule against the attorneys for the purpose of recovering the money so paid.¹³ Not being an asset of the estate, unquestionably the fund is not subject to claims of creditors of the decedent.

With respect to the amount recovered for the pain and suffering of the decedent, however, some question may arise as to whether it does not constitute an asset of the estate to the extent of subjecting it to claims of creditors. While section 9 of the act provides that the action shall be for the benefit of certain designated persons, it must be remembered that the action is in fact but a survival of the decedent's right of action for the injury suffered. The question has not been passed upon by the courts, but it would seem that since the survival of the cause of action is purely a creature of the statute, which provides the purposes for which it shall survive, the fund recovered should not be diverted from the benevolent purposes expressed in the act.

The federal act and not the state laws control the distribution of the sum awarded, whether recovered by action or as the result of a compromise after the bringing of the action, and whether the action is brought under section 1 or section 9 of the act.¹⁴ Hence, the parents of a deceased employee can claim no interest in the amount recovered where the decedent left a surviving widow.¹⁵ And, while the question has never been decided it would seem that this rule should apply to the dis-

¹¹ *Allen v. Napier, Maynard & Plunkett*, — Ga. —, 85 S. E. 1013, citing *Roberts, Injuries to Interstate Employees*, § 139.

¹² *Allen v. Napier, Maynard & Plunkett*, — Ga. —, 85 S. E. 1013.

¹³ *Allen v. Napier, Maynard &*

Plunkett, — Ga. —, 85 S. E. 1013.

¹⁴ *Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 6 N. C. O. A. 436, rev'g 204 N. Y. 135.

¹⁵ *Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 6 N. C. C. A. 436, rev'g 204 N. Y. 135.

tribution of the fruits of a compromise effected without litigation, since the relief afforded by the act is a substantive right of action and not a mere regulation of a remedy.

§ 1340. Release, compromise, and former adjudication or recovery; releases in general. Section 5 of the act is as follows:

"Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

This provision has been upheld by the supreme court as not repugnant to the constitution.¹⁶ Under it the acceptance of benefits on a relief contract does not bar the action, the defendant merely having the right to set off any sum which it had contributed to the benefits received.¹⁷ It applies to contracts entered into before*the passage of the act, as well as to contracts subsequently entered into.¹⁸

The section applies to a contract of membership in a relief department stipulating that the acceptance of benefits under the contract shall be equivalent to a release from liability;¹⁹ but a contract under which decedent, who was an independent contractor, assumed all risk of injury was not within the prohibition of the act.²⁰

¹⁶ *Mondou v. New York, N. H. & H. R. Co.* (Second Employers' Liability Cases) 223 U. S. 1, 56 L. ed. 327, 1 N. C. C. A. 875, 38 L.R.A. (N.S.) 44, rev'g 82 Conn. 373; *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 1 N. C. C. A. 892, aff'g 36 App. Cas. (D. C.) 565.

¹⁷ *Chicago & A. R. Co. v. Wagner*, 239 U. S. 452, 60 L. ed. —, aff'g 265 Ill. 245.

¹⁸ *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 1 N. C. C. A. 892, aff'g 36 App. Cas. (D. C.) 565.

¹⁹ *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 1 N. C. C. A. 892, aff'g 36 App. Cas. (D. C.) 565.

²⁰ *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444, rev'g 125 Minn. 348.

The section has no application to releases given to those who are not employers,²¹ and since a release given to the employer would not under the act bar an action against it by the employee, a joint tort-feasor, when sued by one not in its employ, cannot avail itself of a release given by such employee to his employer on the theory that under the common law of the state the release of one joint tort-feasor is a release of all.²²

§ 1341. **Same subject; release subsequent to injury.** Unquestionably a release for personal injuries, executed after the infliction of the injury, if fairly entered into under circumstances rendering it valid independently of the act, is valid thereunder. The provision was intended merely to protect the employee from antecedent contracts releasing the employer from liability in advance of injury, a class of contracts the viciousness of which is apparent, but which, unfortunately, have received judicial sanction in many states and even in the Supreme Court of the United States.²³

The acceptance of compensation under the Workmen's Compensation Act and the execution of a release after an injury is a bar to an action under the Federal Employers' Liability Act in the absence of proof that release was not fairly entered into.²⁴

§ 1342. **Same subject; compromise or release by decedent as affecting action for his death.** The question as to whether a release by a person injured through the negligence of another bars an action by his personal representative to recover for his subsequent death has been frequently presented in connection with the death acts of the various states. While the decisions are not harmonious the weight of authority undoubtedly supports the conclusion that such a release precludes an action by the personal representative. In the notes will be found a number of decisions in which the various views are presented.²⁵

²¹ *Chicago & A. R. Co. v. Wagner*, 239 U. S. 452, 60 L. ed. —, aff'g 265 Ill. 245.

²² *Chicago & A. R. Co. v. Wagner*, 239 U. S. 452, 60 L. ed. —, aff'g 265 Ill. 245.

²³ *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560; *Suth. Dam. Vol. V.*—18.

Santa Fe, P. & P. R. Co. v. Grant Bros. Const. Co., 228 U. S. 177, 57 L. ed. 787; *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84, 59 L. ed. 849, 8 N. C. C. A. 1.

²⁴ *Mitchell v. Louisville & N. R. Co.*, 194 Ill. App. 77.

²⁵ *Hulbert v. City of Topeka*, 34

The Supreme Court of South Dakota, in a well-considered opinion in which all the authorities are reviewed, held that a release signed by an injured person did not operate as a bar to a subsequent action by his personal representative for his death as a result of such injuries under the Death Act of that state which is analogous to the Lord Campbell Act. The majority opinion after holding that the action for the death involves a new and distinct cause of action from the action for the injury itself, declares:

"We must confess our inability to grasp the logic of any course of so-called reasoning through which the conclusion is drawn that the husband simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action—one which has not then accrued; one which may never accrue; one which from its very nature cannot accrue until his death; and one which, if it ever does accrue, will accrue in favor of his wife and be based solely upon a violation of a right vested solely in the wife. The unsoundness of such reasoning rests not only upon the fact that this cause of action so held to be released is not in existence during the life of the husband, but it rests even

Fed. 510; *Burk v. Arcata & M. River R. Co.*, 125 Cal. 364; *Southern Bell Telephone & Telegraph Co. v. Cassin*, 111 Ga. 575; *Mooney v. City of Chicago*, 239 Ill. 414; *Holton v. Daly*, 106 Ill. 131, rev'g 4 Ill. App. 25; *Maney v. Chicago, B. & Q. R. Co.*, 49 Ill. App. 105; *Pittsburgh, C. & St. L. R. Co. v. Hosea*, 152 Ind. 412; *Hecht v. Ohio & M. Ry. Co.*, 132 Ind. 507; *Missouri Pac. Ry. Co. v. Bennett's Estate*, 5 Kan. App. 231; *Louisville R. Co. v. Raymond's Adm'r*, 135 Ky. 738; *Bowes v. City of Boston*, 155 Mass. 344; *McCarthy v. William H. Wood Lumber Co.*, 219 Mass. 566 (the court held that the decedent during her life could not control the right of action of her personal representa-

tive for the reason that the Massachusetts Act was penal in character); *Sweetland v. Chicago & G. T. Ry. Co.*, 117 Mich. 329; *Hurst v. Detroit City Ry. Co.*, 84 Mich. 539; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693; *Strode v. St. Louis Transit Co.*, 197 Mo. 616; *Littlewood v. Mayor*, 89 N. Y. 24, 42 Am. Rep. 271; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Mahoning Val. R. Co. v. Van Alstine*, 77 Ohio St. 395; *Putman v. Southern Pac. Co.*, 21 Ore. 230; *Brown v. Chicago & N. W. R. Co.*, 102 Wis. 137; *Robinson v. Canadian Pac. Ry. Co.*, [1892] A. C. 481; *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357; *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 555.

more upon the fact that the *legal right* the existence of which is the fundamental element in every cause of action upon which the other elements all rest is not a right that, in the remotest manner, directly or indirectly, belongs to the husband, it is, in fact, a right which the wife, by virtue of the marital relation, holds *against* her husband—a right giving rise to a *duty* upon his part; it is that marital right in lieu of which a court grants alimony when terminating that bond upon which such right and its corresponding duty have theretofore rested.

* * * We apprehend that no one would deny but that it would be the limit of absurdity for one to contend that a wife who had been forcibly abducted could, when settling with the wrongdoer for the wrong done her, the violation of her right of personal liberty, also bind her husband by settling for the wrong done him, the violation of his right to her services, and thus bar his right of action therefor." The court holds that the right of the personal representative to recover in an action for wrongful death is to be determined in the light of whether the facts surrounding the injury created a cause of action in the deceased during his lifetime and not by the existence of a right of action in him at the time of his death from the injury.²⁶

The conclusion of the majority was vigorously dissented from by two of the five justices constituting the court, but so far as the Federal Employers' Liability Act is concerned their dissent was somewhat weakened by their opinion that the South Dakota Death Act did not create a new and independent cause of action.

Decisions construing state acts, however, are of doubtful aid in the solution of the question in the light of the federal act. Many of them proceed upon the theory that the Death Act does not create a new cause of action in favor of the personal representative, and even in states where recovery is allowed for the conscious pain and suffering of the decedent, it has been held that the plaintiff must elect as to whether to sue as at common law upon the decedent's cause of action, or under the statute

²⁶ Rowe v. Richards, 35 S. D. 201.

giving a remedy for his wrongful death, and that he cannot recover on both.²⁷ Whatever may be the rule under the various state acts it is now settled beyond controversy that the federal act creates two distinct causes of action and recovery may be had on both in a single action.²⁸ As was said by the supreme court: "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."²⁹

An expression of the supreme court in an action under the federal act would indicate a tendency to hold that a release by the decedent bars an action by the personal representative. The court says: "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new right of action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrong-

²⁷ *Munro v. Pacific Coast Dredging & Reclamation Co.*, 84 Cal. 515; *Goodsell v. Hartford & N. H. R. Co.*, 33 Conn. 51; *Long v. Morrison*, 14 Ind. 595; *Louisville R. Co. v. Raymond's Adm'r*, 135 Ky. 738; *Hansford's Adm'x v. Payne & Co.*, 11 Bush (Ky.) 380; *Conner's Adm'x v. Paul*, 12 Bush (Ky.) 144; *Donahue v. Drexler*, 82 Ky. 157; *Hackett v. Louisville, St. L. & T. P. R. Co.*, 95 Ky. 236; *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. Rep. 385; *Hackett v. Louisville, St. L. & T. P. R. Co.*, 95 Ky. 236; *Lewis' Adm'r v. Taylor Coal Co.*, 112 Ky. 845, 57 L.R.A. 447; *State v. Maine Cent. R. Co.*, 60 Me. 490; *Safford v. Drew*, 3

Duer (N. Y.) 627; *Mason v. Union Pac. Ry. Co.*, 7 Utah 77; *Graetz v. McKenzie*, 3 Wash. 194.

²⁸ *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

²⁹ *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483. It will be noted that the conclusion of the supreme court in this case is similar to the reasoning upon which the decision of the South Dakota court in the case of *Rowe v. Richards*, 35 S. D. 201, was based, and in fact both cases cite the same authorities to sustain their position.

ful injury." ³⁰ This was *dictum*, however, and the action then before the court arose prior to the Amendment of 1910. In a later decision the court expressly calls attention to its statement in the earlier case, and passes the question. ³¹

§ 1343. Same subject; effect of release by beneficiary. A release by one of the beneficiaries does not bar an action in behalf of other beneficiaries. ³²

§ 1344. Same subject; power of representative to compromise. Since the right of action for death is vested in the personal representative, necessarily he must have full power to settle or compromise the cause of action, although compliance with the state laws governing the procedure in such cases is undoubtedly essential. It has been held in actions not arising under the act that a special administrator may settle a cause of action for wrongful death, although the real parties in interest had no knowledge either of his appointment or the settlement. ³³

To render a settlement by a personal representative valid he must have been regularly appointed. ³⁴ Hence where a jurisdictional step was omitted the order of the probate court appointing a personal representative being a nullity, a settlement by him does not bar an action under the act. ³⁵

§ 1345. Same subject; former adjudication or recovery. A judgment in an action prosecuted under the state law, and litigating different issues is not a bar to a subsequent action

³⁰ Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495. It is to be noted in this connection that the authorities cited by the court to sustain its contention deny a recovery where the deceased executed a release prior to his death.

³¹ St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

³² Moffett v. Baltimore & O. R. Co., 135 C. C. A. 607, 220 Fed. 39.

³³ Jones v. Minnesota T. R. Co., 108 Minn. 129; Foot v. Great Northern Ry. Co., 81 Minn. 493, 52 L.R.A. 384, 83 Am. St. Rep. 395.

³⁴ Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, aff'd 241 U. S. 211, 60 L. ed. —.

³⁵ Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, aff'd 241 U. S. 211, 60 L. ed. —. So held where a special administrator was appointed by the court although the statutory petition for such appointment had not been filed.

under the Federal Employers' Liability Act.³⁶ Nor can such a judgment in an action by the beneficiaries operate as a bar to a subsequent action by the personal representative of the deceased, brought under the federal act.³⁷

It would seem that a judgment rendered against the employee in an action to recover for personal injuries is *res adjudicata* barring a subsequent action by the personal representative to recover for his death as a result of such injuries. For though the causes of action are separate and distinct, both are predicated upon the same wrongful act or omission upon the part of the defendant, and where a court of competent jurisdiction has found that the defendant was not guilty of the wrong charged its finding should be conclusive in a subsequent action based upon the same charge of wrongdoing whether the action is commenced in the same or a different court. This view has been adopted in actions based upon state laws and is probably applicable to actions under the federal act.³⁸

The supreme court declined to consider whether the recovery by the decedent during his lifetime for injuries sustained, barred an action for his wrongful death by his personal representative because of the concluding clause of section 9, "there shall be only one recovery for the same injury."³⁹

§ 1346. Limitation of actions. Section 6 of the act provides that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." This provision is applicable in all actions by or in behalf of railroad employees, against the railroad company employing them, for injuries sustained while both were engaged in interstate commerce,⁴⁰ and a failure to bring the

³⁶ *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. ed. 586, rev'g 118 C. C. A. 272, 200 Fed. 44.

³⁷ *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. ed. 586, rev'g 118 C. C. A. 272, 200 Fed. 44.

³⁸ *Frescoln v. Puget Sound Trac-*

tion, Light & Power Co., 225 Fed. 441.

³⁹ *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

⁴⁰ *Shannon v. Boston & M. R. R.*, 77 N. H. 349.

action within the statutory period operates as a bar although not pleaded.⁴¹

It will be noted that the period of limitations does not begin to run until the cause of action accrues. In actions for personal injuries no question can arise as to when the right of action accrues, but where recovery is sought for the death of an employee, does the action accrue at the time of death or is the accrual postponed until the appointment of the personal representative of the deceased, who alone is entitled to maintain the action? It has been held by a federal court in a well reasoned opinion that an action for the death of an employee does not accrue until the appointment of a personal representative, and hence the period of limitations does not begin to run until that time.⁴²

The amendment of pleadings after the expiration of the statutory period is treated elsewhere.⁴³

§ 1347. Pleading; requisites and sufficiency in general. The plaintiff must allege facts showing that at the time of the injury the defendant was a common carrier by railroad within the act, and that both the defendant and the injured employee were engaged in interstate commerce.⁴⁴ The necessity of such allegations is well expressed by a state court as follows:

"It is essential to the certain and orderly administration of the law of master and servant, as these distinct enactments establish it, that the initial pleading, or its amendment, be so drawn that the courts may be able to determine under which of the two enactments, state or federal, the respective counts are intended to assert a claim for liability. The sufficiency *vel non* of counts under our state statute necessarily involve questions that will not arise upon the issue of sufficiency *vel*

⁴¹ *Atlantic Coast Line R. R. v. Burnette*, 239 U. S. 199, 60 L. ed. —, rev'g 163 N. C. 186.

⁴² *American R. Co. of Porto Rico v. Coronas*, 230 Fed. 545, 12 N. C. C. A. 49.

⁴³ See § 1348 *infra*.

⁴⁴ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 9

N. C. C. A. 109, rev'g 156 N. C. 496; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S. W. 1099, 3 N. C. C. A. 800; *Shade v. Northern Pac. Ry. Co.*, 206 Fed. 353; *Southern R. Co. v. Howerton*, 182 Ind. 208; *Chicago, R. I. & P. Ry. Co. v. McBee*,

non of counts seeking to declare upon a liability under the federal statute; and the provisions of the latter enactment forbid matters of defense admissible in an action under the state statute.”⁴⁵

A petition is defective which does not allege that the defendant was a common carrier⁴⁶ and a petition under the Safety Appliance Act prior to its amendment was held insufficient where it did not allege that at the time of the injury the defective couplers were being used in interstate commerce.⁴⁷ It is not essential, however, that the pleadings should refer to the act to bring the action within its terms,⁴⁸ and a reference in the pleadings to a state statute does not alter the rule.⁴⁹

It is sufficient if the facts alleged show that the injury was incurred in the course of employment in interstate commerce,⁵⁰ thus an allegation that the defendant operated a line of railroad through and outside the state, and that the decedent was employed by it in the construction, repairing and maintaining of the roadbed of such railway, amounts to an allegation that defendant was engaged in interstate commerce and that the decedent was employed by it in such commerce.⁵¹

While rules of pleading have become more liberal, yet in order to found a cause of action upon the alleged shortcomings of another, they must at least be so far plainly set up as to show actual damages and the wrongful act of the adverse party as the proximate and natural cause. The particulars of the alleged wrong resulting in damages should be so set forth that

— Okla. —, 145 Pac. 331; Cincinnati, N. O. & T. P. R. Co. v. Tucker, 168 Ky. 144.

⁴⁵ Ex parte Atlantic Coast Line R. Co., 190 Ala. 132.

⁴⁶ Shade v. Northern Pac. Ry. Co., 206 Fed. 353.

⁴⁷ Brinkmeier v. Missouri Pac. Ry. Co., 224 U. S. 268, 56 L. ed. 758, aff'g 81 Kan. 101.

⁴⁸ Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919; St. Louis, S. F. & T. R. Co. v.

Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S. W. 1099, 3 N. C. C. A. 800; Cincinnati, N. O. & T. P. R. Co. v. Tucker, 168 Ky. 144.

⁴⁹ Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919.

⁵⁰ Grand Trunk W. R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, aff'g 120 C. C. A. 166, 201 Fed. 836.

⁵¹ Jorgenson v. Grand Rapids & I. Ry. Co., — Mich. —, 155 N. W. 535.

the court may be able to see therefrom that such alleged damages are neither obscure, vague nor shadowy, but might, and probably would, naturally result from the acts complained of.⁵²

Where the petition states a cause of action solely under the state law there cannot be a recovery under the federal act, in the absence of an amendment,⁵³ and a similar rule should prevail where the cause of action alleged is solely under the federal act, precluding a recovery under the state law,⁵⁴ although there is authority to the contrary.⁵⁵ Even though the petition sets up a cause of action under the state law, the necessary allegations may be supplied by the defendant's answer and thus permit a recovery under the federal act.⁵⁶

Where the petition states a cause of action under the state law, and the evidence shows a case under the federal act, the defendant is entitled to raise the question without pleading it specially.⁵⁷

Where the plaintiff's allegations predicate a cause of action under the state laws, the defendant to defeat liability must plead the federal act, and, in the absence of such a plea evidence tending to show the applicability of the federal act is not admissible.⁵⁸ But the fact that the act was not pleaded by the defendant does not preclude reliance thereon where the evidence adduced shows that at the time of the injury the plaintiff was engaged in interstate commerce.⁵⁹

⁵² *McGuire v. Gerstley*, 204 U. S. 489, 51 L. ed. 581.

⁵³ *Gaines v. Detroit*, G. H. & M. R. Co., 181 Mich. 376; *Moliter v. Wabash R. Co.*, — Mo. App. —, 168 S. W. 250; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379; *Penny v. New Orleans G. N. R. Co.*, 135 La. 962; *Midland Val. R. Co. v. Ennis*, 109 Ark. 206.

⁵⁴ *Id.*, *Creteau v. Chicago & N. W. R. Co.*, 113 Minn. 418.

⁵⁵ *Jones v. Chesapeake & O. R. Co.*, 149 Ky. 566.

⁵⁶ *Vickery v. New London N. R. Co.*, 87 Conn. 634; *White's Adm'x v. Central Vermont R. Co.*, 87 Vt.

330, aff'd 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265; *St. Louis, I. M. & S. R. Co. v. Sharp*, 115 Ark. 308.

⁵⁷ *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, rev'g — *Tex. Civ. App.* —, 148 S. W. 1099, 3 N. C. C. A. 800.

⁵⁸ *Illinois Cent. R. Co. v. Nelson*, 138 C. C. A. 525, 212 Fed. 69; *Bradbury v. Chicago, R. I. & P. R. Co.*, 149 Iowa 51, 40 L.R.A. (N.S.) 684; *Fleming v. Norfolk Southern R. Co.*, 160 N. C. 196.

⁵⁹ *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 59 L. ed. 671, rev'g 88 Ohio St. 536.

Contributory negligence must be pleaded to be available.⁶⁰ A plea setting up contributory negligence in bar and not in mitigation of damages has been held to be demurrable.⁶¹ And since a plea that the employee knew of the defect, or negligently failed to discover same is as much a plea of contributory negligence as one of assumption of risk it is bad on demurrer.⁶² However, the accuracy of these rulings would seem to depend upon whether they were in accordance in recognized and established local practice.⁶³

§ 1348. *Same subject; amendments.* Where the petition states a cause of action under the state law, it may be amended so as to make it conform to the proof bringing the case within the federal act,⁶⁴ and, where an action is improperly brought under the act, the pleadings may be amended so as to conform to the proof, and this is permissible on remand after reversal.⁶⁵

Where the sole beneficiaries join as plaintiffs in an action under the act, an amendment substituting the personal representative of the deceased as a party plaintiff is properly allowed,⁶⁶ nor is such an amendment barred by the period of limitations fixed by the act on the theory that it introduces a new cause of action.⁶⁷ An amendment expressly bringing the case within the federal act may properly be allowed after the expiration of the period of limitations.⁶⁸ But where an amendment

⁶⁰ *San Antonio & A. P. Ry. Co. v. Littleton*, — Tex. Civ. App. —, 180 S. W. 1194. *Contra*, *Jones v. Kansas City Southern R. Co.*, 137 La. 178, reversed on other grounds 241 U. S. 181, 60 L. ed. —.

⁶¹ *Southern Ry. Co. v. Peters*, — Ala. —, 69 So. 611.

⁶² *Southern Ry. Co. v. Peters*, — Ala. —, 69 So. 611.

⁶³ *Kansas City Southern R. Co. v. Jones*, 241 U. S. 181, 60 L. ed. —, rev'g 137 La. 178.

⁶⁴ *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144.

⁶⁵ *Illinois Cent. R. Co. v. Kelly*, 167 Ky. 745.

⁶⁶ *Missouri, K. & T. R. Co. v.*

Wulf, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919. See also *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. ed. 586, rev'g 118 C. C. A. 272, 200 Fed. 44.

⁶⁷ *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919. But see *Hall v. Louisville & N. R. Co.*, 157 Fed. 464, aff'd 98 C. C. A. 664, 174 Fed. 1021; *Allen v. Tuscarora Val. R. Co.*, 229 Pa. 97, 30 L.R.A. (N.S.) 1096, 140 Am. St. Rep. 714; *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983.

⁶⁸ *Jorgenson v. Grand Rapids & I.*

introduces a new or different cause of action it is equivalent to a new suit, as to which the running of the period of limitations is not arrested.⁶⁹ Where an amendment merely expanded or amplified what was alleged in the support of a cause of action already asserted, it relates back to the commencement of the action and is not affected by the expiration of the period of limitations.⁷⁰ Thus where a complaint set forth that the defendant was operating a line of railroad between certain states, that the plaintiff was in defendant's employ, that when he was injured, he was in the line of duty, proceeding to board one of defendant's trains, that the injury was sustained in another state through the defendant's negligence in permitting the right of way to remain in a dangerous condition, it was held not error to permit an amendment alleging that at the time of the injury both the plaintiff and the defendant were engaged in interstate commerce although such permission was given after the expiration of the period of limitation fixed in the act.⁷¹

Permitting the trial to proceed after the allowance of an amendment bringing the action under the federal act is not erroneous where defendant's counsel refused to claim surprise.⁷² The allowance of an amendment alleging facts bringing the case within the act raises no question under the laws of the United States.⁷³

§ 1349. Same subject; actions for death. In actions for death the existence of the beneficiaries named in the statute must be alleged and proved;⁷⁴ but a petition which shows that the persons in whose behalf the action is maintained are within the statutory classification of beneficiaries is sufficient;⁷⁵ and

Ry. Co., — Mich. —, 155 N. W. 535.

⁶⁹ *Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, 60 L. ed. —, aff'g — N. C. —, 84 S. E. 964.

⁷⁰ *Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, 60 L. ed. —, aff'g — N. C. —, 84 S. E. 964.

⁷¹ *Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, 60 L. ed. —, aff'g — N. C. —, 84 S. E. 964.

⁷² *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352, 60 L. ed. —, aff'g 101 S. C. 86.

⁷³ *Kansas City Western Ry. Co. v. McAdow*, 240 U. S. 51, 60 L. ed. —, aff'g (Mo. App.), 164 S. W. 188.

⁷⁴ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 9 N. C. O. A. 109, rev'g 156 N. C. 496.

⁷⁵ *Illinois Cent. R. Co. v. Stewart*, 138 C. C. A. 444, 223 Fed. 30.

the inclusion of persons not entitled to share in the distribution is immaterial where upon the trial reference to them is treated as surplusage, and the court expressly limits recovery to the use of the proper beneficiaries.⁷⁶

Where the action is prosecuted for the benefit of the parents of the deceased the plaintiff must allege and prove that decedent left no widow or children surviving him.⁷⁷ However, in the absence of direct evidence upon the subject, the evidence may be such as to permit an inference that such was the case.⁷⁸

A declaration which contains no positive averment of pecuniary loss to the parents for whose benefit the action was brought, and which does not set out facts or circumstances sufficient to apprise the defendant with reasonable particularity that such loss was suffered, is insufficient.⁷⁹

§ 1350. Same subject; alternative allegations setting up both state and federal law. To protect himself in advance of definite knowledge as to which law applies, the plaintiff may set up a cause of action under the federal act in one count and under the state law in another count.⁸⁰ However, the courts are not in accord as to whether an election may be required and, if so, at what stage of the proceedings. On the one hand it is contended that, since the liabilities and defenses under the state and federal laws are frequently very different in character, it is imposing too great a burden upon the defendant to expect it to meet the varying, and in fact conflicting issues presented where an election is not required in advance of trial. This view has been upheld.⁸¹

On the other hand it is claimed that to require an election in advance of trial will frequently work a hardship upon the plaintiff, since, where the facts are obscure, he would be re-

⁷⁶ *Illinois Cent. R. Co. v. Stewart*, 138 C. C. A. 444, 223 Fed. 30.

⁷⁷ *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

⁷⁸ *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

⁷⁹ *Garrett v. Louisville & N. R. Co.*, 235 U. S. 308, 59 L. ed. 242, aff'g 117 C. C. A. 109, 197 Fed. 715.

⁸⁰ *San Antonio & A. P. Ry. Co. v. Littleton*, — Tex. Civ. App. —, 180 S. W. 1194.

⁸¹ *Louisville & N. R. Co. v. Strange's Adm'x*, 156 Ky. 439; *South Covington & C. St. R. Co. v. Finan's Adm'x*, 153 Ky. 340; *Thompson v. Cincinnati, N. O. & T. P. R. Co.*, 165 Ky. 256.

quired to elect at a time when he could not intelligently determine which act applied. This view seems to be supported by the weight of authority.⁸² As was said by the Massachusetts Supreme Judicial Court:

"It oftentimes would be a great hardship upon the parties to compel them to try out first the question whether the federal act applies, and, if it, in the end shall be decided that it does not, then to test, by further litigation, their rights under the state statute. The short period of limitations provided in each act often might expire before a final decision could be reached. If adverse to the plaintiff on the ground of error in the form of relief sought, he thus might be barred from a just recovery. Although both the federal and state statutes are liberal, * * * nevertheless the allowance of such amendments rests commonly in the sound discretion of the trial judge and is not subject to revision on exceptions. As it is not a matter of right, substantial interests might be lost through no fault of a plaintiff who constantly had been alert in his own behalf.

"The federal act has been construed as covering injuries occurring at the moment when the particular service performed is a part of interstate commerce. * * * Whether a railroad employee is engaged in interstate or intrastate commerce often involves legal discrimination of great nicety about which even the justices of the highest court are not always in harmony. * * * It would be a saving of expense both to the parties and to the Commonwealth if the two actions could be prosecuted together, so that by one trial the facts could be ascertained and the causes ended by the determination of the governing principles of law. Where the settlement of an issue of fact depends upon conflicting evidence, it seems more likely that the truth will be ascertained by adducing all the evidence at one

⁸² *Corbett v. Boston & M. R. R.*, 219 Mass. 351, 9 N. C. C. A. 691; *Bankson v. Illinois Cent. R. Co.*, 196 Fed. 171; *Koennecke v. Seaboard Air Line Ry.*, 101 S. C. 86, aff'd 239 U. S. 352, 60 L. ed. —; *Howell v. Atlantic Coast Line R. Co.*, 99 S. C. 417; *Ex parte Atlantic Coast*

Line R. Co., 190 Ala. 132, rev'g *Atlantic Coast Line R. Co. v. Jones*, 9 Ala. App. 499; *Atkinson v. Bullard*, 14 Ga. App. 69; *Tinkham v. Boston & M. R. R.*, 77 N. H. 111. See also note in 9 N. C. C. A. 691-702, where all of the authorities are exhaustively reviewed.

time before a single tribunal and enabling it to find out the real situation under an adequate statement of the governing rules of law applicable to all phases, than to require two distinct and successive inquiries before separate tribunals where only a single aspect of the incident could be open to investigation at one time.

"There are important points of dissimilarity between the rights conferred and the burdens imposed under the two statutes. The rules of evidence may be different. The principles of law by which liability may be established under the two statutes are somewhat divergent. Difficulties will be presented in the trial which will require great care and a strong grasp by the presiding judge, and careful discrimination by jurors. But these are not insurmountable obstacles, nor do they appear to counterbalance the advantages which will accrue in permitting a conjoint prosecution of the two causes in appropriate instances."⁸³

§ 1351. Practice in general. Questions pertaining to mere matter of procedure, such as pleading, or the order of evidence are governed by the *lex fori*.⁸⁴ But a substantive right or defense arising under the act cannot be impaired or destroyed by a rule of state practice.⁸⁵

The Seventh Amendment to the Constitution of the United States under which a substantial compliance with the common-law standard as to what constitutes a jury is exacted applies only to the federal government and is inapplicable to proceedings in a state court, even under the federal act. Consequently, in an action under the Federal Employers' Liability Act, in a state court trial may be had before, or a verdict returned by, a jury of less than twelve where authorized by the laws of the state.⁸⁶ Of course, in actions in the United States courts, the

⁸³ Corbett v. Boston & M. R. R., 219 Mass. 351, 9 N. C. C. A. 691.

⁸⁴ Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330.

⁸⁵ Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, aff'g 163 N. C. 351; Atlantic

Coast Line R. R. v. Burnette, 239 U. S. 199, 60 L. ed. —, rev'g 163 N. C. 186, failure to plead bar of limitations immaterial.

⁸⁶ Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. —, aff'g 128 Minn. 112; St. Louis & S. F. R. Co. v. Brown, 241 U. S.

jury must be constituted in accordance with the common-law standards.⁸⁷

§ 1352. **Same subject; parties.** In case of death the act give a right of action to the personal representative of the deceased employee, and the action can only be prosecuted by such representative.⁸⁸ And this is true although the persons suing as plaintiffs are the sole surviving beneficiaries of the decedent.⁸⁹ In the event of the death of an employee after commencing an action for his personal injuries, the personal representative only is entitled to revive and prosecute the action.⁹⁰

Letters of administration may be issued notwithstanding the fact that the decedent left no property aside from the right of action for his death under the statute.⁹¹

An ancillary administrator is entitled to maintain an action under the act where he was appointed in the state where the death occurred and his suit was prosecuted with the approval of the domiciliary administratrix who was the personal beneficiary.⁹² But a foreign administrator is not entitled to sue in

223, 60 L. ed. —; Chesapeake & O. Ry. Co. v. Carnahan, 241 U. S. 241, 60 L. ed. —; Louisville & Nashville R. Co. v. Stewart, 241 U. S. 261, 60 L. ed. —, aff'g 163 Ky. 823; Chesapeake & O. R. Co. v. Kelly's Adm'r, 241 U. S. 485, 60 L. ed. —, aff'g 161 Ky. 655; Chesapeake & O. R. Co. v. Gainey, 241 U. S. 494, 60 L. ed. —, rev'g 162 Ky. 427; Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260; Louisville & N. R. Co. v. Johnson's Adm'x, 161 Ky. 824.

⁸⁷ Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. —, aff'g 128 Minn. 112.

⁸⁸ American R. Co. of Porto Rico v. Birch, 224 U. S. 547, 56 L. ed. 879; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919; Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, 57 L. ed. 586,

rev'g 118 C. C. A. 272, 200 Fed. 44; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S. W. 1099, 3 N. C. C. A. 800; Penny v. New Orleans G. N. R. Co., 135 La. 962; Cincinnati, N. O. & T. P. R. Co. v. Bonham, 130 Tenn. 435; Hearst v. St. Louis, I. M. & S. R. Co., 188 Mo. App. 36.

⁸⁹ American R. Co. of Porto Rico v. Birch, 224 U. S. 547, 56 L. ed. 879; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355; Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, 57 L. ed. 586, rev'g 118 C. C. A. 272, 200 Fed. 44.

⁹⁰ St. Louis Southwestern Ry. Co. v. Brothers, — Tex. Civ. App. —, 165 S. W. 488.

⁹¹ Gulf, C. & S. F. Ry. Co. v. Beezley, — Tex. Civ. App. —, 153 S. W. 651.

a state other than that in which he was appointed unless authorized to do so by the *lex fori*.⁹³

The want of legal capacity in one other than the personal representative to sue as an individual under the act is substantive in character and not subject to waiver,⁹⁴ and may be raised in the appellate court for the first time.⁹⁵ Where the widow in an action under the state law recovered judgment for the death of her husband, who was killed while both he and the railroad employing him were engaged in interstate commerce, it has been held that she could not after the entry of judgment appear as administratrix and adopt the judgment.⁹⁶

A fellow-servant or an agent of the company whose negligence caused the injury cannot be sued under the federal act since it applies exclusively to common carriers by railroad. But he is nevertheless liable under the state law. He cannot therefore be joined as a codefendant with the railroad company.⁹⁷ Where under the laws of the state the lessor of a railroad continues liable for the acts of the lessee, the lessor may be sued for an injury sustained by an employee of the lessee through the negligence of the latter.⁹⁸

§ 1353. **Same subject; removal of causes.** Under the amendment of 1910 an action under the act cannot be removed to the federal courts upon the ground of diversity of citizenship⁹⁹ nor upon any ground whatsoever.¹

⁹² *Anderson v. Louisville & N. R. Co.*, 127 C. C. A. 277, 210 Fed. 689.

⁹³ *Baltimore & O. R. Co. v. Evans*, 110 C. C. A. 156, 188 Fed. 6. See also *Midland Val. R. Co. v. Lemoyne*, 104 Ark. 327; *Hall v. Southern R. Co.*, 146 N. C. 345.

⁹⁴ *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283.

⁹⁵ *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, rev'g 98 Ark. 240; *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435; *La Casse v. New Orleans, T. & M. R. Co.*, 135 La. 129; *Southern Ry. Co. v. Howerton* (Ind. App.), 101 N. E. 121.

⁹⁶ *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155. See also *Dungan v. St. Louis & S. F. R. Co.*, 178 Mo. App. 164.

⁹⁷ *Kelly's Adm'x v. Chesapeake & O. Ry. Co.*, 201 Fed. 602.

⁹⁸ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496. *Contra*, *Wagner v. Chicago & A. R. Co.*, 265 Ill. 245, aff'd 239 U. S. 452, 60 L. ed. —, 11 N. C. C. A. 1087.

⁹⁹ *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, rev'g 112 Ark. 305.

¹ *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478,

§ 1354. **Same subject; evidence.** As in the case of other branches of practice, the question of evidence is largely governed by local rules, unless the parties are thereby deprived of substantial rights under the act.² State and federal courts take judicial notice of the act.³

Evidence of the age, probable duration of life, habits of industry, means, earnings, health, skill, intelligence and character of the deceased, his reasonable future expectation, and other like facts, is admissible.⁴

To assist the jury in arriving at its determination, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are admissible.⁵ But the rules derived from such tables are not absolute guides which the jury is bound to follow.⁶ They are not inadmissible merely because of the fact that owing to the dangers of his employment the employee was not, at the time of the accident, an insurable risk.⁷

Evidence tending to show the character of plaintiff's ordinary pursuits, and the extent to which his injury prevented him from following those pursuits is admissible, and this is true although no financial loss is caused thereby, since it tends to show the extent of his physical and mental suffering.⁸ Testimony tending to show the character of the work performed by plaintiff before and after the accident is competent upon the question as to how far his capacity of earning a livelihood had been impaired by his injury.⁹

rev'g 112 Ark. 305; Southern Ry. Co. v. Lloyd, 239 U. S. 496, 60 L. ed. —, aff'g 166 N. C. 24.

² Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330.

³ Cincinnati, N. O. & T. P. R. Co. v. Tucker, 168 Ky. 144.

⁴ Louisville & N. R. Co. v. Fleming, — Ala. —, 69 So. 125.

⁵ Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257; Culp v. Virginian Ry. Co., — W. Va. —, 87 S. E. 187.

⁶ Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257.

⁷ Culp v. Virginian Ry. Co., — W. Va. —, 87 S. E. 187.

⁸ District of Columbia v. Woodbury, 136 U. S. 450, 34 L. ed. 472, where evidence that plaintiff, a doctor, had contributed to medical journals prior to his injury was held admissible although there was no evidence that he had been paid therefor.

⁹ Texas & P. R. Co. v. Volk, 151 U. S. 73, 38 L. ed. 78, where it was

The rejection of evidence tending to show contributory negligence cannot be sustained upon the ground that it was offered in bar and not in mitigation of damages, especially where objection on that ground was not made at the time of the exclusion, and there was no settled local rule requiring counsel without inquiry by the court, to announce in advance the purpose for which evidence is tendered.¹⁰ Upon the question of negligence or contributory negligence the defendant is not limited to its printed rules, but may properly introduce in evidence special instructions given to its employees, together with other well known rules, practices and customs promulgated by it to govern its employees in the safe operation of its trains.¹¹

Contradictory statements have no legal tendency to establish the truth of a subject matter to which they relate.¹²

§ 1355. **Same subject; instructions.** While the substance of the instructions given is of course controlled by the act, and must conform to the construction placed thereon by the Supreme Court of the United States, the form, manner of giving and the like is purely a matter of local practice, so long as neither of the parties is thereby deprived of substantial rights under the act.¹³

In the courts of the United States the judge, in submitting a case to the jury, may, in his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately sub-

held that testimony of a fellow-workman that after the injury plaintiff's employer "just kept him on, being he got hurt, so he could make a living for his wife and family" was held properly admitted.

¹⁰ *Kansas City Southern Ry. Co. v. Jones*, 241 U. S. 181, 60 L. ed. —, rev'g 137 La. 178.

¹¹ *Culp v. Virginian Ry. Co.*, — W. Va. —, 87 S. E. 187.

¹² *Southern Ry. Co. v. Gray*, 241 U. S. 333, 60 L. ed. —, rev'g 167 N. C. 433.

¹³ The sufficiency of particular instructions is treated in connection with the sections to which they relate.

¹⁴ *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257.

mitted to the determination of the jury, will not be reviewed.¹⁴ The powers of the federal courts in this respect are not controlled by the statutes of the state forbidding judges to express any opinion upon the facts.¹⁵

Where a judgment of the state appellate court affirmed the judgment below on the ground that there was no evidence of assumed risk sufficient to require the trial court to prepare and give a proper instruction in lieu of a defective one offered by the defendant in accordance with the local practice requiring the trial court to prepare or direct the preparation of proper instructions in such case where the issue is one which should be submitted to the jury and an examination of the record shows the existence of evidence sufficient to present the issue, the judgment of the state court will be reversed.¹⁶

§ 1356. **Same subject; special interrogatories.** The submission of special interrogatories as to the amount which the jury deducted for contributory negligence is discretionary with the court,¹⁷ and it has been held proper to refuse to submit to the jury a special issue on the question of contributory negligence.¹⁸

§ 1357. **Same subject; question for jury.** It has been held that the sufficiency of the evidence to take the case to the jury will be determined in accordance with the rule prevailing in the state courts.¹⁹ While the question has not as yet been definitely settled, the supreme court has held that the sufficiency of the evidence to sustain a recovery, under the act, when properly

¹⁵ *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286.

¹⁶ *Chesapeake & O. Ry. v. De Atley*, 241 U. S. 310, 60 L. ed. —, rev'g 159 Ky. 687.

¹⁷ *Huxoll v. Union Pac. R. Co.*, — Neb. —, 155 N. W. 900.

¹⁸ *Lloyd v. Southern R. Co.*, 166 N. C. 24, 7 N. C. C. A. 520, aff'd 239 U. S. 496, 60 L. ed. —, where the defendant requested the court to submit the following special issues:

"(1) Did the plaintiff contribute

by his negligence to his own injury, as alleged in the answer? (2) How much is the whole amount of damages sustained by the plaintiff by reason of the injuries received by him? (3) What sum should be deducted from the damages sustained by plaintiff as the proportion or just share thereof attributable to the negligence of the plaintiff?"

¹⁹ *Louisville & N. R. Co. v. Johnson's Adm'x*, 161 Ky. 824, where the so-called "scintilla" rule prevailing in Kentucky was applied in an action under the act.

preserved, presents a federal question, and hence reviewable by that court.²⁰ This being true, reason would suggest that it must be determined, when presented, in accordance with the rules prevailing in the federal courts. Whether an employee is engaged in interstate commerce is ordinarily a mixed question of law and fact.²¹ Where the undisputed facts, however, show that the parties were engaged solely in intrastate commerce at the time of the injury it is error to submit to the jury the question as to whether the state or the federal law applies,²² and in such case the court may decide the question as one of law.²³ But where an issue of fact is raised as to whether they were engaged in interstate commerce at the time of the accident, it has been held that the court should instruct the jury on both issues and allow them to decide which law applies according as they find the facts.²⁴ And where the evidence leaves the question in doubt, it should be submitted to the jury under proper instructions.²⁵ The submission of the question to the jury where the evidence warranted a peremptory instruction is not prejudicial, however, where the complaining party was not harmed thereby.²⁶ Refusal to instruct that the plaintiff was not engaged in interstate commerce is proper where there was evidence in support of plaintiff's claim that he was so employed at the time of his injury.²⁷

The court cannot properly direct a verdict for the defendant unless it can say as a matter of law that the employee's acts con-

²⁰ *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

²¹ *Atkinson v. Bullard*, 14 Ga. App. 69.

²² *Atchison, T. & S. F. R. Co. v. Pitts*, 44 Okla. 604, 9 N. C. C. A. 545.

²³ *Louisville, & N. R. Co. v. Hollo-way's Adm'r*, 163 Ky. 125, 9 N. C. C. A. 546n; *Cousins v. Illinois Cent. R. Co.*, 126 Minn. 172, 6 N. C. C. A. 182, rev'd 241 U. S. 641, 60 L. ed. — (mem. dec.).

²⁴ *Oamp v. Atlanta & C. Air Line R. Co.*, 100 S. C. 294.

²⁵ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496; *Cherpeski v. Great Northern R. Co.*, 128 Minn. 360.

²⁶ *Pelton v. Illinois Cent. R. Co.*, — Iowa —, 150 N. W. 236.

²⁷ *Southern Ry. Co. v. Lloyd*, 239 U. S. 496, 60 L. ed. —, aff'g 166 N. C. 24, 7 N. C. C. A. 520.

stituted negligence which was the sole, proximate cause of his injuries.²⁸

§ 1358. **Appeal and error.** Where the case is taken to the United States Supreme Court from a state court, the power of the former to review is governed by the Judicial Code.²⁹ Hence merely incidental questions not federal in character will not be considered; in other words, questions cannot be reviewed which do not in their essence involve the existence of a right in the plaintiff to recover under the federal act, or the right of the defendant to be shielded from responsibility under that act, because when properly applied no liability on its part would result.³⁰ In such cases the court is not a court of general review,³¹ and, upon a writ of error to a state court, the supreme court will not consider assignments of error which do not involve a construction of the act.³²

The rule as to what are federal questions is best stated in the language of the supreme court in an action under the Safety Appliance Act: "Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from which the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the

²⁸ *Houston B. & T. Ry. Co. v. Barger*, — Tex. Civ. App. —, 176 S. W. 870.

²⁹ Rev. St. § 709, Judicial Code § 237. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, rev'g 145 Ky. 427; *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

³⁰ *Seaboard Air Line R. Co. v.*

Padgett, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

³¹ *Seaboard Air Line R. Co. v. Duvall*, 225 U. S. 477, 56 L. ed. 1171, s. c. 152 N. C. 524, writ of error dismissed.

³² *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330.

act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all states of the Union.”³³ But it must “appear from the record that there was necessarily present a definite issue as to the correct construction of the act, so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error.”³⁴

In another case it was said: “Where in a controversy of a purely federal character the claim is made and denied that there was no evidence tending to show liability under the federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the federal law.”³⁵ But the mere assertion of a formal right under the act is not sufficient to present a federal question, unless the right so asserted is substantial.³⁶

A claim that the trial court erred in not taking the case from the jury upon the ground that there was no evidence sufficient to justify the submission of the case to the jury, presents a federal question reviewable by the supreme court.³⁷ Whether an amendment was granted in violation of the period of limitations prescribed in the act presents a federal question subject to re-examination in the Supreme Court of the United States, however much the allowance of the amendment otherwise might have rested in the discretion of the court below or have been a matter of local procedure.³⁸

Where under an established rule of state practice it is the

³³ *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, rev'g 71 Ark. 445; *Seaboard Air Line R. Co. v. Duvall*, 225 U. S. 477, 56 L. ed. 1171, s. c. 152 N. C. 524, writ of error dismissed.

³⁴ *Seaboard Air Line R. Co. v. Duvall*, 225 U. S. 477, 56 L. ed. 1171, s. c. 152 N. C. 524, writ of error dismissed.

³⁵ *St. Louis, I. M. & S. R. Co. v.*

McWhirter, 229 U. S. 265, 57 L. ed. 1179, rev'g 145 Ky. 427.

³⁶ *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

³⁷ *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

³⁸ *Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, aff'g — N. C. —, 84 S. E. 964.

duty of the court where instructions are offered upon any issue respecting which the jury should be instructed to prepare or direct the preparation of proper instructions where those offered are incorrect in form or substance and an improper instruction was refused by the state court, the action being sustained by the state appellate court on the ground that there was no evidence upon which it could be predicated, even if properly drawn, a federal question is presented permitting a review in the Supreme Court of the United States, and where there was evidence which would require the giving of a proper instruction in accordance with the practice of the state the judgment will be reversed.³⁹

The application of the common law of the state in no way involving the construction or application of the federal act does not present a federal question.⁴⁰ Hence the decision of the state court that defects in a pleading were cured by evidence and admissions in other pleadings does not present a federal question.⁴¹ The action of the court in treating a declaration as amended to conform to the proofs, involves a mere question of local practice.⁴² So where the trial court treated an allegation that plaintiff was engaged in interstate commerce as eliminated, the evidence showing that the accident occurred outside of interstate commerce, the court's action involved the application of a mere rule of local practice and raised no question of federal right.⁴³

The conclusion of the state court, supported by the record, that the issue of assumption of risk was not presented, and

³⁹ *Chesapeake & O. Ry. Co. v. De Atley*, 241 U. S. 310, 60 L. ed. —, rev'g 159 Ky. 687.

⁴⁰ *Chicago & A. R. Co. v. Wagner*, 239 U. S. 452, 60 L. ed. —, aff'g 265 Ill. 245 where the state court held that the defendant, who was not the plaintiff's employer, was not discharged by a release given by plaintiff to his employer, who was a joint tort-feasor with defendant.

⁴¹ *Central Vermont R. Co. v.*

White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. O. A. 265, aff'g 87 Vt. 330.

⁴² *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 6 N. C. C. A. 224, s. c. 180 Ill. App. 511, writ of error dismissed.

⁴³ *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 6 N. C. C. A. 224, s. c. 180 Ill. App. 511, writ of error dismissed.

⁴⁴ *Southern Ry. Co. v. Lloyd*, 239 U. S. 496, 60 L. ed. —, aff'g 166 N. C. 24, 7 N. C. C. A. 520.

therefore under the state practice was not reviewable on appeal does not deny a federal right.⁴⁴ An assignment of error based upon the court's charge that if the jury found that if the act of an employee in "going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation" he would be guilty of contributory negligence does not present a federal question, since it raises no specific question as to the proper construction of the act.⁴⁵

Questions as to the excessiveness of the verdict will not be reviewed by the supreme court on writ of error to a state court⁴⁶ and where no error of law intervenes the judgment will not be reversed on that ground.⁴⁷

Whether the question of employment in interstate commerce was properly raised in the trial court is a question of state practice⁴⁸ and where the highest court of the state either decided or assumed that the record presented a question of federal right, and decided against the party asserting that right, the supreme court will pass upon the merits of the question so raised.⁴⁹

An objection which was not raised in the state appellate court will not be considered by the Supreme Court of the United States.⁵⁰ A motion for a peremptory instruction sufficiently challenges the plaintiff's right to proceed under the state law.⁵¹

Where the judgment of the United States Circuit Court is founded upon the Federal Employers' Liability Act, the judgment of the circuit court of appeals is not final, and, where it

⁴⁵ *Seaboard Air Line R. Co. v. Duvall*, 225 U. S. 477, 56 L. ed. 1171, s. c. 152 N. C. 524, writ of error dismissed.

⁴⁶ *Southern Ry.—Carolina Division v. Bennett*, 233 U. S. 80, 58 L. ed. 860, 10 N. C. C. A. 853, aff'g 98 S. C. 42.

⁴⁷ *Southern Ry.—Carolina Division v. Bennett*, 233 U. S. 80, 58 L. ed. 860, 10 N. C. C. A. 853, aff'g 98 S. C. 42, where a verdict for \$20,000 was rendered for the death of a fireman whose life expectancy was

30 years and whose earnings were \$900 per year.

⁴⁸ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109.

⁴⁹ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109.

⁵⁰ *Jacobs v. Southern Ry. Co.*, 241 U. S. 229, 60 L. ed. —, aff'g 116 Va. 189.

⁵¹ *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144.

exceeds one thousand dollars, it may be reviewed by the supreme court on writ of error.⁵²

Mere disputes as to the conflicting tendencies of the proof will not be reviewed.⁵³ Where at the request of the defendant the court instructed the jury that the employee was not engaged in interstate commerce at the time of his injury, the defendant is estopped to make a contrary claim.⁵⁴ Where the state law is so similar to the federal act that the liability of the defendant would not be affected by the question of which governed the case, it is immaterial which law is applicable,⁵⁵ and an instruction upon contributory negligence under the state law is not ground for reversal where it is more favorable than the rule applicable under the federal act.⁵⁶ The refusal of an instruction as to the legal result which could follow only upon certain hypotheses which were expressly negatived by special findings of the jury is not ground for reversal.⁵⁷

The rule in the federal courts is that an erroneous instruction on damages cannot be cured by remittitur where the elements of damages are of such an indeterminate character that there is no criterion for segregation.⁵⁸ Since, where contributory negligence is claimed, the amount of the verdict is necessarily dependent upon the amount of negligence attributable to the defendant, the submission of an improper issue of negligence

⁵² *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919.

⁵³ *Chicago, R. I. & P. Ry. Co. v. Devine*, 239 U. S. 52, 60 L. ed. —, aff'g 266 Ill. 248.

⁵⁴ *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 6 N. C. C. A. 224, s. c. 180 Ill. App. 511, writ of error dismissed.

⁵⁵ *Kansas City W. Ry. Co. v. McAdow*, 240 U. S. 51, 60 L. ed. —, aff'g (Mo. App.), 164 S. W. 188; *Chicago & N. W. R. Co. v. Gray*, 237 U. S. 399, 59 L. ed. 1018, 9 N. C. C. A. 452, aff'g 153 Wis. 637.

⁵⁶ *Chicago, R. I. & P. Ry. Co. v.*

Wright, 239 U. S. 548, 60 L. ed. —, aff'g 96 Neb. 87. In this case the state court erroneously proceeded upon the theory that the action was governed by the state law under which contributory negligence was a bar to recovery, except where the employee's negligence was slight and that of the employer gross in comparison, in which case the negligence of the former was not a bar but operated to diminish the damages proportionately.

⁵⁷ *Kanawha & M. Ry. Co. v. Kerse*, 239 U. S. 576, 60 L. ed. —.

⁵⁸ *New York, C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952.

is prejudicial notwithstanding the submission of another and proper issue upon which a finding of negligence could have been sustained.⁵⁹

The fact that the court below may have inaccurately expressed in one respect its reasons for affirmance does not require the supreme court to reverse the judgment where no reversible error exists.⁶⁰ Where a judgment in favor of the plaintiff in an action under the act was reversed by the state court and upon the subsequent trial the plaintiff recovered a less amount, judgment for which was affirmed by the state court, the United States Supreme Court will not order the former judgment reinstated where an erroneous instruction was given upon the first trial.⁶¹ The Supreme Court, however, declined to consider whether if error had not intervened in the first trial, judgment thereon would have been reinstated notwithstanding the judgment in the second trial.⁶² Where a judgment is erroneous because the action was prosecuted in the name of the widow it should be reversed without prejudice to her rights under the act.⁶³

The practice of granting a partial new trial upon the sole question of damages, eliminating the question of contributory negligence is rarely proper, and, as the supreme court says, not to be commended.⁶⁴ However, where the issues are clearly severable, such as where upon the trial below the jury in answers to special interrogatories expressly found that the employee was free from contributory negligence, and their finding was justified by the evidence, the granting of a partial new trial

⁵⁹ *Louisville & N. R. Co. v. Heinig's Adm'x*, 162 Ky. 14. In such case the jury might well conclude that as the plaintiff was negligent in but one particular, while the carrier was negligent on two grounds, the negligence of the defendant was much greater, thus requiring the latter to bear the greater part of the loss.

⁶⁰ *St. Louis & S. F. R. Co. v. Brown*, 241 U. S. 223, 60 L. ed. —.

⁶¹ *Louisville & N. R. Co. v. Stew-*

art, 241 U. S. 261, 60 L. ed. —, *aff'g* 163 Ky. 823, s. c. 156 Ky. 550, 157 Ky. 642.

⁶² *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. ed. —, *aff'g* 163 Ky. 823, s. c. 156 Ky. 550, 157 Ky. 642.

⁶³ *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435.

⁶⁴ *Norfolk Southern R. Co. v. Ferebee*, 238 U. S. 269, 59 L. ed. 1303, *aff'g* 163 N. C. 351.

upon the sole issue of the amount of damages does not present a federal question, especially where the defendant made no request for the modification of the mandate, nor for permission to introduce newly discovered evidence.⁶⁵ The offer of the plaintiff after judgment to consent to a partial new trial on the issue of damages does not preclude a reversal for partial new trial on the ground of error in the instructions on damages, since it is the province of the court to determine the propriety of a new trial even though both parties consent to it.⁶⁶

Where the state law provides for the addition of a penalty of ten per cent. of the damages recovered in the event of an affirmance where a supersedeas is obtained on appeal or error, such a penalty is properly assessed in an action under the Federal Employers' Liability Act where the judgment appealed from is affirmed.⁶⁷

⁶⁵ *Norfolk Southern R. Co. v. Ferebee*, 238 U. S. 269, 59 L. ed. 1303, aff'g 163 N. C. 351.

⁶⁶ *Kenney v. Seaboard Air Line R. Co.*, 165 N. C. 99.

⁶⁷ *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. ed. —, aff'g 163 Ky. 823, s. c. 156 Ky. 550, 157 Ky. 642.

CHAPTER XLI.

WORKMEN'S COMPENSATION ACTS.

§1359. Introduction.

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- 1384. Same subject; assaults.
- 1385. Dependency.
- 1386. Notice.
- 1387. Award of compensation.
- 1388. Injuries caused by negligence of third persons.

§ 1359. Introduction. No remedial legislation in American history has proved as popular as the so-called Workmen's Com-

pensation Acts. In the seven years which have elapsed since the passage of what was practically the first American Act, thirty-two states have accepted the principle that the burden of industrial accidents should be borne in part by society as represented by the industry, while the federal government has but recently passed an act applicable to federal employees.

The subject is not directly connected with the Law of Damages, and treatment within the scope of a single chapter must necessarily be confined to a mere outline or skeleton of the rules applicable.

§ 1360. **Nature, scope and effect.** Compensation acts partake more of the law of insurance than probably any other branch of the law. In a measure they provide for a species of industrial insurance. The growth of industrialism, and the increased use of dangerous and complicated machinery, the constantly increasing toll of dead and maimed workmen, and the injustice and inadequacy of the common-law remedies were the moving factors in the passage of the acts.

In principle, the liability under the acts is contractual, since either expressly or impliedly they enter into the contract of employment, and, where injury occurs, liability grows out of this *quasi* contractual relation independently of negligence or tort.¹

The purpose of the act is to compensate the injured employee within certain limits for the pecuniary loss suffered as the result of his injury, or, in the event of his death, to give such compensation to his legal beneficiaries. No account is taken of his pain or suffering, although in some states compensation is allowed for disfigurement; but, even then, the compensation is not predicated upon the mental anguish suffered, but rather upon the pecuniary loss attendant upon the difficulty in securing remunerative employment.

¹The construction placed upon the Iowa Act by the Supreme Court of that state renders it anomalous, since negligence on the part of the master must be shown. It is in-

deed an employers' liability act rather than a compensation act, possessing none, or at best but few, of the beneficial qualities of either form of legislation. See *Hunter v.*

The award is necessarily more or less arbitrary, particularly as to injuries resulting in total permanent incapacity; that is, injuries which will wholly incapacitate the employee from again engaging in his employment, or partial permanent incapacity. In all cases the award is based upon the earnings of the employee, thus further emphasizing its pecuniary basis. The acts do not aim to compensate the employee fully for his injury, since no provision is made for the pain and suffering endured, and, even as to the actual pecuniary loss suffered, the relief is not complete, as the award carries only a certain percentage of the average earnings of the employee between certain fixed maximum and minimum amounts. As a result, the loss does not fall upon the employer alone, but is shared by the employee.²

In practical operation, the effect of the acts is to reduce a substantial recovery which might have been had by a minority of injured workmen at common law in favor of a universal recovery, under the acts, by injured employees who would otherwise have been without a remedy. The theory of the act is that the plan of compensation it provides for injuries suffered in the course of the employment is more advantageous than a suit for damages.³

Being remedial in character, the act should receive a broad and liberal interpretation ⁴ so as to effectuate its beneficent pur-

Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

² Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 10 N. C. C. A. 1.

³ Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

⁴ The California Workmen's Compensation, Insurance and Safety Act is, under section 86 (a) thereof, to be liberally construed. Massachusetts Bonding & Insurance Co. v. Pillsbury, 170 Cal. 767, 11 N. C. C. A. 426.

The Massachusetts Workmen's

Compensation Act is a remedial statute and is to be so construed as to include all controversies arising under the act between the employee and the employer and the insurer. In re Panasuk, 217 Mass. 589, 5 N. C. C. A. 688.

The Workmen's Compensation Act (Laws 1913, c. 467 [Gen. St. 1913, §§ 8195-8230]) is remedial in its nature, and must be given a liberal construction, to accomplish the purpose intended. The provisions defining when the relation of employer and employee exists bring within the act all cases in which,

pose.⁵ Although a contrary rule seems to prevail in Michigan.⁶

It is the purpose of the compensation acts to remove from the field of litigation all questions arising from the injury of an employee where both the employer and the employee are voluntarily or involuntarily within the act⁷ with the exception that in most states where the injury is caused by the negligence of a third person recovery against him may be had at common law, or the remedy against the employer under the act followed, at the option of the employee.⁸

Many of the acts also permit an action at law by the employee against the employer where the injury was due to the wilful failure of the employer to comply with statutes intended for the safety of employees, or to his deliberate intention to produce the injury.⁹

under the above rule, such relation is found to exist. *State ex rel. Virginia & Rainy Lake Co. v. District Court St. Louis Co.*, 128 Minn. 43, 7 N. C. C. A. 1076.

The New York Workmen's Compensation Act must be broadly and liberally interpreted in order to protect employees for injuries received in the course of their employment, and to charge upon the fund or the insurer the loss which must otherwise fall upon the master. *Spratt v. Sweeney & Gray Co.*, 168 N. Y. App. Div. 403, 9 N. C. C. A. 918.

⁵ *Foth v. Macomber & Whyte Rope Co.*, 161 Wis. 549, 11 N. C. C. A. 599.

⁶ The Michigan Compensation Act being in derogation of the common law is to be strictly construed even though remedial. *Andrejwski v. Wolverine Coal Co.*, 182 Mich. 298, 6 N. C. C. A. 807.

⁷ *Peet v. Mills*, 76 Wash. 437, 4 N. C. C. A. 786, L.R.A.1916A 358; *Northern Pac. Ry. Co. v.*

Meese, 239 U. S. 614, 10 N. C. C. A. 939.

The original Workmen's Compensation Act (Laws 1911, c. 218, as amended by c. 216, Laws 1913) leaves an employee in industries within its purview no other remedy than the one provided by the act, where neither the employer nor employee has filed a statement of his election not to accept thereunder. *Shade v. Ash Grove Lime & Portland Cement Co.*, 92 Kan. 146, 5 N. C. C. A. 763.

An injured workman who takes advantage of the Oregon Workmen's Compensation Act (L. 1913, c. 112), cannot recover damages in an action against his employer under the Employers' Liability Act unless he brings himself within one of the exceptions mentioned in the compensation act. *Jenkins v. Carman Mfg. Co.*,— Ore. —, 155 Pac. 703, 11 N. C. C. A. 547.

⁸ See *infra*, § 1388.

⁹ By the words the "deliberate intention of his employer to produce such injury," as used in section 22

The Arizona Act is anomalous in this respect. It does not limit the remedy of an injured employee who has not disaffirmed before the injury to the compensation provided by the act, but he may, after the injury, elect whether he will enforce the remedy provided by the act, or whether he will pursue his common-law remedy or his remedy under the Arizona Employers' Liability Law.¹⁰

The Massachusetts Workmen's Compensation Act does not affect a parent's right of action for injuries to his minor child, though the latter comes within and has accepted the act and has received compensation thereunder for his injuries.¹¹

It has been held that a common-law action for personal injuries received in Idaho, in which state the common law prevails, may be brought in Washington, although, under the Workmen's Compensation Act of the latter state, such an action would not lie had the injury been received in Washington.¹²

An employer who does not elect to bring himself within the provisions of the act is deprived of the defense of the negligence of an injured employee, unless wilful; or that the negligence was that of fellow-servants; or that the injury was caused by the assumption of the risks inherent in or incidental to, or arising out of the employment, or from the failure to provide and

of the Oregon Workmen's Compensation Act which gives a workman, sustaining an injury as the result of "the deliberate intention of his employer to produce such injury," the right to take under the act and also to bring an action against his employer for damages over the amount payable thereunder, the legislature meant to imply that the employer must have determined to injure the employee and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness or negligence, however gross. *Jenkins v. Carman Mfg. Co.*, — Ore. —, 155 Pac. 703, 11 N. C. C. A. 547.

¹⁰ *Consolidated Arizona Smelting Co. v. Ujack*, 15 Ariz. 382, 5 N. C. C. A. 742.

¹¹ The provision of the Massachusetts Workmen's Compensation Act (St. 1911, pt. 2, § 5), that the insurer shall pay a part of the medical expenses made necessary by injury to an employee does not take away, by implication, the parent's right of action for injuries to a minor employee. *King v. Viscoloid Co.*, 219 Mass. 420, 7 N. C. C. A. 254.

¹² *Reynolds v. Day*, 79 Wash. 499, 5 N. C. C. A. 814, L.R.A.1916A 432.

maintain safe premises and suitable appliances; or that the employee's contributory negligence was the proximate cause thereof.¹³ And, in action against the rejecting employer, evidence of such rejection is admissible.¹⁴ But an employer who has not elected to bring himself within the provisions of the act, is not answerable for injuries sustained by an employee, in the absence of some negligence on the part of the former.¹⁵ The abo-

¹³ *Lydman v. De Haas*, 185 Mich. 128, 8 N. C. C. A. 649.

Part B, § 1 of the Workman's Compensation Act (Conn. Pub. Acts of 1913, c. 138), provides that any employer who, having accepted part B of the act, fails to comply with § 30 of part B as to insurance of liability, shall forfeit all benefits thereunder and be liable as if he had not accepted the same. *Held*, that such failure to comply with § 30 deprives the employer of the right to exemption from liability at common law for injuries to his employees arising out of their employment and renders him liable to such actions as modified by part A, but while such failure on the part of the employer deprives him of his benefits under part B, it does not deprive the employee of his benefits thereunder, and the latter may claim compensation under the act or, where the common law gives a remedy, bring such an action as modified by part A. *Bayon v. Beckley*, 89 Conn. 154, 8 N. C. C. A. 588.

Negligence or assumed risk on the part of a deceased employee will not avail a negligent employer who has not elected to take the benefit of the Ohio Workmen's Compensation Act. *Crucible Steel Forge Co. v. Moir*, 219 Fed. 151, 8 N. C. C. A. 1006.

Under the Illinois Workmen's Compensation Act (Laws of 1911, p. 315, J. & A. ¶ 5449), if the employer has elected not to be bound by the act, the employee is remitted to an action at law, except that the employer cannot interpose the defenses of assumed risk, negligence of a fellow servant and contributory negligence, and in such an action it is not error to refuse instructions, requested by the defendant, based on these defenses, nor to give instructions for plaintiff based on the theory that these defenses were not available. *Crooks v. Tazewell Coal Co.*, 263 Ill. 343, 5 N. C. C. A. 410.

Under the Illinois Workmen's Compensation Act of 1911 (Laws 1911, p. 315, J. & A. ¶ 5449), an employer not operating under the act cannot plead that an employee injured by falling while attempting to stand on a slanting chute and work assumed the risk of the injury. *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 5 N. C. C. A. 419.

But see *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 157 N. W. 145, 11 N. C. C. A. 886.

¹⁴ *Crooks v. Tazewell Coal Co.*, 263 Ill. 343, 5 N. C. C. A. 410.

¹⁵ *Lydman v. De Haas*, 185 Mich. 128, 8 N. C. C. A. 649; *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

lition of the common-law defenses is not limited to actions against employers who have elected to go under the act and thereafter elect not to be governed by it.¹⁶ In order that the provision of the Illinois Act abolishing the common-law defenses as to employers electing not to be bound by the act may apply, it is not necessary that the employee shall be under the provisions of the act.¹⁷

To avail himself of the benefits of the act in an action by an employee against him for personal injuries, the employer must plead and prove that he has complied with the requirements of the act.¹⁸

§ 1361. **Constitutionality in general.** Probably nothing illustrates the progressive tendencies of the courts better than the practical unanimity with which the various compensation acts have been sustained.^{18a} In only three states have such acts been declared unconstitutional in their entirety, New York,¹⁹ Montana²⁰ and Kentucky.²¹ And, in all of these states, new acts

¹⁶ *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 5 N. C. C. A. 419.

¹⁷ *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 5 N. C. C. A. 419.

¹⁸ *Acres v. Frederick & Nelson*, 79 Wash. 402, 5 N. C. C. A. 557.

^{18a} *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 10 N. C. C. A. 1; *Massachusetts Bonding & Insurance Co. v. Pillsbury*, 170 Cal. 767, 11 N. C. C. A. 426; *Sayles v. Foley*, — R. I. —, 96 Atl. 340, 12 N. C. C. A. 949; *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

The Illinois Workmen's Compensation Act of 1911 (Laws 1911, p. 315, J. & A. ¶ 5449), is constitutional. *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 5 N. C. C. A. 419.

The Workmen's Compensation Bill Part I, § 1, which provides that,

in an action brought to recover damages for personal injuries to or death of an employee, it shall be no defense that he was negligent, or that the injury was caused by the negligence of a fellow employee, or that the risk was assumed, when construed as meaning contributory negligence or negligence of a fellow-servant which falls short of serious and wilful misconduct, is constitutional. In re Opinion of Justices, 209 Mass. 607, 1 N. C. C. A. 557.

The Minnesota Act contains no provisions prohibited by the State or Federal Constitution and is valid. *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 5 N. C. C. A. 871.

¹⁹ *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 1 N. C. C. A. 517, 34 L.R.A.(N.S.) 162.

²⁰ The Miners' Compensation Act (Laws 1909, Chap. 67), which provides a scheme of accident insurance and disability benefits for employees

have been adopted, which have been found free from the constitutional deficiencies of the prior enactments.²²

In conformity with the usual rules of construction, the acts have been construed so as to render them valid, wherever possible.²³ They have been found not to be in conflict with the public policy of the state.²⁴

The courts are not concerned with the wisdom of the act and cannot declare it invalid merely because it is unwise legislation; the question of policy is pre-eminently one for the law-making branch of the government and the courts will interfere only when there is no question as to the evil tendencies of the act.²⁵

It is within the power of the legislature to provide new measures or means for the recovery of compensation by servants who sustain injuries in the performance of the duties of their employment,²⁶ and, while the effect of the compensation act upon the rights of employees cannot be properly weighed or determined without a due consideration of its aim and policy in their interest, the inquiry whether the legislature was without the power to completely change the law upon the subject of the em-

engaged in mining coal within the state, to be paid from a fund collected from mine operators in accordance with the amount of coal mined and from employees in accordance with the amount of wages earned, is unconstitutional in that it fails to protect the employer who furnishes compensation under the act, from being sued for the injury in an action at law, and thus compelled to pay twice. *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 1 N. C. C. A. 720.

²¹ *Kentucky State Journal Co. v. Workmen's Compensation Board*, 161 Ky. 562, L.R.A.1916A 389.

²² *Lewis & Clark County v. Industrial Acc. Board of Montana*, — Mont. —, 155 Pac. 268; *Greene v. Caldwell*, — Ky. —, 186 S. W. 648, 12 N. C. C. A. 520.

Authority for the adoption of the New York Workmen's Compensation Act (Consol. L., c. 67; L. 1914, c. 41), is found in the amendment of November 4, 1913, to section 19, article I, of the Constitution of the State of New York. *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A.1916A 403.

²³ *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

²⁴ *Memphis Cotton Oil Co. v. Tolbert*, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547.

²⁵ *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

²⁶ *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 1 N. C. C. A. 517, 34 L.R.A.(N.S.) 162.

ployer's liability for accidental injuries to his employee has no concern in the wisdom of the change, takes no account of the reason for it, and is limited to the naked question of the legislature's power.²⁷

Various provisions of the acts have been attacked on various grounds,²⁸ such as the sufficiency of the title,²⁹ payments in lump sums,³⁰ interference with interstate

²⁷ *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

²⁸ Clause "f" of section 19 of the Illinois Workmen's Compensation Act, as amended by L. 1915, p. 410, which provides that the judgment of the circuit court on certiorari to the Industrial Board shall be reviewable only by the supreme court, is not violative of section 29, article VI of the Constitution of 1870, which provides that "All laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." *People ex rel. Munn v. McGoorty*, 270 Ill. 610, 10 N. C. C. A. 978.

Provision in Illinois Act authorizing supreme court to issue certiorari for review of decisions of Industrial Board is unconstitutional. *Courter v. Simpson Const. Co.*, 264 Ill. 488, 6 N. C. C. A. 548.

The Miners' Compensation Act which provides for indemnity to be paid to injured employees engaged in mining coal in the state, from a fund collected by assessment levied on both the employer and employee, is not unconstitutional on the ground that it fails to differentiate

between a careful and careless employer. *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 1 N. C. C. A. 720.

Part 2 of the Minnesota Act substitutes the rights, remedies, and liabilities therein provided for those previously existing, and employers and employees subject thereto are limited to such rights and remedies; but such provisions impair no constitutional rights, as they apply only to those who have voluntarily chosen to become subject thereto, and such choice is no less optional because part 2 is presumed to have been accepted by all employers and employees who have not given notice to the contrary. *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 5 N. C. C. A. 871.

²⁹ The Texas Workmen's Compensation Act (Acts 33rd Leg. c. 179), contains but one general subject; its purpose is one general object; and its title sufficiently expresses it. *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873; *Memphis Cotton Oil Co. v. Tolbert*, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547.

³⁰ The Miners' Compensation Act (Laws 1909, Chap. 67), which provides for an indemnity to be paid to employees injured in the course of their employment in the mining of coal within the state, is not in-

commerce,³¹ provisions relative to minors,³² and the like, but, with few exceptions, none of the objections have been sustained.³³

§ 1362. **Same subject; delegation of judicial functions.** Administrative boards may lawfully be endowed with very broad powers and, when acting within their jurisdiction and not otherwise, their decisions are conclusive and not subject to review in any proceeding.³⁴

Accordingly, it is held that the commissions created to administer the act are not courts, but administrative bodies empowered to ascertain and determine some questions of fact, and, to that extent, acting *quasi* judicially it is true, but nevertheless, not vested with judicial functions in violation of constitutional restrictions,³⁵ the jurisdiction of the courts not being

valid as a police regulation, on the ground that it provides for the payment to an injured employee of his compensation in a lump sum. *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 1 N. C. C. A. 720.

³¹ The New York Workmen's Compensation Act (Consol. L., c. 67; L. 1914, c. 41), does not violate the Federal Constitution by directly attempting to impose a burden or tax on interstate or foreign commerce. *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A. 1916A 403.

³² A provision in the Workmen's Compensation Act (Wis. Laws, 1911, c. 50; stat. §§ 2394-1 to 2394-32), declaring that a minor legally entitled to work shall have the same power of contracting for service as an adult, is not objectionable, as the legislature may endow minors with the right to make contracts otherwise lawful. *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

³³ *Wood v. City of Detroit*, —

Mich. —, 155 N. W. 592; *Mackin v. Detroit-Timkin Axle Co.*, — Mich. —, 153 N. W. 49; *Grand Rapids Lumber Co. v. Blair*, — Mich. —, 157 N. W. 29; *Troth v. Millville Bottling Works*, — N. J. L. —, 98 Atl. 435; *Watts v. Ohio Val. Elec. Ry. Co.*, — W. Va. —, 88 S. E. 659.

³⁴ *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

³⁵ The Illinois Workmen's Compensation Act (Laws of 1911, p. 315, J. & A. ¶ 5449), is not unconstitutional as delegating judicial power to arbitrators. *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 5 N. C. C. A. 401; *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 1 N. C. C. A. 720; *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A. (N.S.) 694; *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873; *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

completely ousted thereby even where there has been an acceptance of the act.³⁶

§ 1363. **Same subject; abolition of defenses.** Under the British Act and in all American Acts except in Iowa none of the common-law defenses is available where both the employer and the employee are within the act, the whole subject of compensation being removed from the law of Negligence and placed under the law of Contracts.³⁷ The Iowa Supreme Court, however, has placed an anomalous construction upon the act of that state, which may perhaps be sustained by the peculiar wording of its provisions. The court held that, even as to an employer within the act, the defense of want of negligence was not barred.³⁸

On the other hand, such defenses are still retained to protect employers electing to accept the act against rejecting employees.

An employer rejecting the act is precluded from asserting the common-law defenses of assumption of risk, contributory negligence, and the fellow-servant doctrine. As these defenses were created by the courts, it is within the undoubted power of the legislature to abolish them absolutely independently of the compensation acts. They have been the subject of innumerable legislative restrictions which have been uniformly sustained by the courts, notably the Federal Employers' Liability Act.³⁹

It is difficult to conceive, therefore, of any constitutional objections to their abolition as against employers refusing to accept the compensation acts, since, independently of such rejection, the legislature could preclude their being asserted as defenses in actions at law based purely upon the negligence of the employer. Such provisions of the compensation acts have, therefore, been sustained in every instance when presented to the courts.⁴⁰

³⁶ *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

³⁷ *Lavin v. Wells Bros. Co.*, 272 Ill. 609.

³⁸ *Hunter v. Colfax Consol. Coal*

Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

³⁹ See ch. 40 *ante*.

⁴⁰ *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 5 N. C. C. A. 401; *Hunter v. Colfax Consol. Coal Co.*, — Iowa

The power to classify is primarily in the legislature; the courts accord it the widest latitude in performing this function, hence, a classification adopted by it will be sustained unless it is so palpably arbitrary as to leave no room for doubt that the legislature has abused its discretion in the matter.⁴¹ The question as to the legitimacy of the classification in the compensation acts is not whether there may be some in one class whose situation is practically the same as that of some in the other class, but whether there is "a distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them."⁴² Where a compensation act is not compulsory, therefore, and the class of employees included in, and that excluded from its operation, are each permitted to and can readily put itself into the position of the other, whatever discrimination there may be against either, would seem to be purely academic.⁴³

The fact that the act preserves intact the defenses of assumption of risk, and negligence of a fellow-servant as to employers electing to accept the act, but abolishes such defenses as to employers rejecting it;⁴⁴ or classifies employers in accordance with

—, 154 N. W. 1037, 11 N. C. C. A. 886; *In re Opinion of Justices*, 209 Mass. 607, 1 N. C. C. A. 537; *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 5 N. C. C. A. 871; *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 3 N. C. C. A. 569; *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A. (N.S.) 694; *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873; *De Francesco v. Piney Min. Co.*, — W. Va. —, 86 S. E. 777, 10 N. C. C. A. 1015; *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

⁴¹ *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037,

11 N. C. C. A. 886; *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

⁴² *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

⁴³ *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁴⁴ *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489; *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 3 N. C. C. A. 569; *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886; *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 5 N. C. C. A. 871.

the hazards⁴⁵ or character⁴⁶ of the employment, or the number of employees,⁴⁷ or excludes certain classes of employees from its operation⁴⁸ does not render it unconstitutional as class legislation.

⁴⁵ The Industrial Insurance Law (Wash. L. 1911, c. 74), which provides for the contribution by employers in extrahazardous employments of fixed sums based upon their payrolls for the purpose of creating a fund to reimburse all employees injured in such employments, without regard to negligence or common-law liability therefor, which fund is to be administered by the state, to the exclusion of all other remedies or rights to compensation, does not violate Washington Constitution, art. 1, sec. 12, which prohibits class legislation. *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

⁴⁶ Exclusion of railroads not invalid. *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

The Miners' Compensation Act (Laws 1909, Chap. 67), which creates a state insurance fund for the benefit of workmen disabled while engaged in mining coal within the state, is not unconstitutional as class legislation as singling out a particularly hazardous occupation and subjecting it to burdens not placed on other employments equally hazardous, where the statute is equally applicable to workmen within the state engaged in the particularly hazardous business of mining coal. *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 1 N. C. C. A. 720.

⁴⁷ *Middleton v. Texas Power &*

Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

A workmen's compensation act affecting only employers of five or more employees and applicable only to workmen or operatives, is not invalid on the ground that it makes an unjust and arbitrary classification. *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A.(N.S.) 694.

A minor classification in the Workmen's Compensation Act (Wis. Laws 1911, c. 50; stat. §§ 2394-1 to 2394-32), by which the fellow-servant defense is preserved to all employers employing less than four employees in a common employment, is valid. *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A.(N.S.) 489.

The Ohio Workmen's Compensation Act (G. C. §§ 1465-37 *et seq.*), is not unconstitutional as arbitrarily discriminating against employers of five or more workmen in depriving them of the defense of the employee's contributory negligence where they fail to comply with the requirements of the act, while such defense may still be made by employers of four or less. *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364, 7 N. C. C. A. 570.

⁴⁸ The classification adopted by the Texas Workmen's Compensation Act (Acts 33rd Leg. c. 179), whereby domestic servants, and farm and gin laborers are excluded from its operation, held not such as to justify a holding that it was purely arbitrary.

Thus classification for purposes of taxation or of regulation under a police measure, of workmen engaged in the erection or demolition of bridges or buildings of iron or steel construction, or in the operation of elevators used in connection with the erection or demolition of such bridges or buildings, or in work on scaffolds of any kind elevated 20 feet or more, or about wires charged with electric currents, or with explosives, or in the operation of railroads, or in the construction of tunnels and subways, or in work carried on under compressed air, is not a denial of the equal protection of the laws, on the ground that the classification is arbitrary.⁴⁹ And, although a state constitution confers power upon the legislature to create liability upon the part of "all" employers, it does not compel the legislature to

trary. *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

The exclusion from the operation of the Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), of household or domestic servants, farm or other laborers engaged in agricultural pursuits, and persons whose employment is of a casual nature is not palpably arbitrary. *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

Excluding domestic servants, farm laborers, casual employees, and such railroads and railroad employees as are engaged in interstate commerce from the provisions of the Minnesota Workmen's Compensation Act does not render it unconstitutional as class legislation. *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 5 N. C. C. A. 871.

Workmen's Compensation Bill, Part I, § 2, providing that § 1 of such bill which declares that, in an action for injury to or death of an

employee, it shall be no defense that the employee was negligent, or that the injury was caused by the negligence of a fellow employee, or that he assumed the risk of injury, shall not apply to domestic servants and farm laborers, is not unconstitutional. *In re Opinion of Justices*, 209 Mass. 607, 1 N. C. C. A. 557.

The exclusion of casual, farm, dairy, etc., employees from the operation of a compensation act, does not render such law vulnerable as special legislation. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 10 N. C. C. A. 1.

The provisions of the Illinois Workmen's Compensation Act (Laws of 1911, p. 315, §§ 21, 22, J. & A. ¶¶ 5470, 5471), defining the employees to whom the act shall apply is not unconstitutional as class legislation. *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 5 N. C. C. A. 401.

⁴⁹ *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 1 N. C. C. A. 517, 34 L.R.A.(N.S.) 162.

act with respect to all employers, but merely gives the power to do so.⁵⁰

The Illinois Workmen's Compensation Act has been held not unconstitutional as depriving the employee of his common-law remedies while permitting the employer to retain them.⁵¹

Classification common to the various compensation acts has uniformly been held not to operate as a denial of equal protection of the law.⁵²

§ 1364. **Same subject; police power; vested and contract rights; due process of law.** Whether authority for the passage of compensation acts is to be found in the police power of the state or in the taxing power is largely a matter of academic interest, except in so far as the power employed may be affected by constitutional restrictions. On the one hand, it is claimed that such measures are authorized by the power of the state to provide for the general welfare of the public, in other words, the police power;⁵³ while others find its basis in the taxing

⁵⁰ *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 10 N. C. C. A. 1.

⁵¹ *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 5 N. C. C. A. 401.

⁵² *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 10 N. C. C. A. 1; *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886; *Memphis Cotton Oil Co. v. Tolbert*, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547.

The Industrial Insurance Law (Wash. L. 1911, c. 74), which requires employers in extrahazardous employments to contribute toward a fund from which losses sustained by employees in such employments shall be paid without regard to negligence or common-law liability, is not a denial to owners of property of the equal protection of the laws. *State ex rel. Davis-Smith Co. v.*

Clausen, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

A compensation act which precludes an action under the Washington Death Act against the third person whose negligence causes the death of an employee while he is engaged about his ordinary duties at his employer's plant, does not for that reason, conflict with the equal protection clause of the Fourteenth Amendment. *Northern Pac. Ry. Co. v. Meese*, 239 U. S. 614, 10 N. C. C. A. 939.

⁵³ The requirements of the Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), in case of their acceptance constitute a proper exercise of the police power of the state—such exercise thereof as would sustain compulsory acceptance. *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

power, in other words, the power under which the state provides for education, charities and the like, the fundamental purpose of the acts being to prevent public dependency.⁵⁴ The Legislature may provide how compensation shall be made in case of accidental injury to employees in the public service and, in raising funds to discharge those indemnities, the levying of taxes by municipalities becomes a public purpose and taxpayers are not deprived of their property without due process of law.⁵⁵

The Miners' Compensation Act (Laws 1909, Chap. 67), providing for state industrial insurance and compensation for injuries sustained by employees engaged in mining coal within the state, is constitutional, as a valid exercise of the police power. *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 1 N. C. C. A. 720.

The provisions of sections 15 to 20 of the act passed February 26, 1913, known as the "Workmen's Compensation Law" (103 Ohio Laws, p. 72), constitute a valid exercise of the legislative power not repugnant to the Constitution or to any limitation contained therein. *Porter v. Hopkins*, 91 Ohio St. 74, 9 N. C. C. A. 839.

An act (102 Ohio L. 524), providing a plan of compensation from a state insurance fund, for accidental injuries sustained by those employed in industrial pursuits pertains to the public welfare and is a valid exercise of the police power. *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A. (N.S.) 694.

The Texas Workmen's Compensation Act (Laws 1913, c. 179), is not unconstitutional as not within the state's police power. *Memphis Cotton Oil Co. v. Tolbert*, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C.

C. A. 547; *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

The Washington Act is within the police power as a reasonable enactment in support of economic and moral considerations affecting the protection of the public health, safety or welfare, although it incidentally deprives some persons of property without fault; and since it is not so unreasonable or extravagant as capriciously to interfere with or destroy private rights. *State ex rel. Davis-Smith Co. v. Clausen, State Auditor*, 65 Wash. 156, 2 N. C. C. A. 823, 37 L.R.A. (N.S.) 466.

The Illinois Workmen's Compensation Act (Laws of 1911, p. 315, J. & A. ¶ 5449 *et seq.*), is not an exercise of police power. *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 5 N. C. C. A. 401. This decision fails to point out the basic power involved.

⁵⁴ *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 1 N. C. C. A. 720.

See exhaustive article by James Harrington Boyd, 10 N. C. C. A. 1, where all of the authorities are reviewed.

⁵⁵ *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

Independently of the source of authority involved, the acts, as heretofore pointed out, have been sustained with practical unanimity as proper exercises of the legislative functions.

Rights of property which have been created by the common law cannot be taken away by the legislature, being protected from destruction by any process except the due process of the law, that is, law in its regular course of administration through courts of justice; but no one has a vested interest in the rules, themselves, of the common law, and it is within the power of the legislature to change or entirely repeal them,⁵⁶ and, while the right to contract is a property right, like all other property rights it is subservient to the public welfare, and may be taken by the state in a well-directed effort to promote the public welfare by the exercise of the police power.⁵⁷ Hence an act which requires employers in extrahazardous employments to contribute fixed sums based upon their payrolls, for the creation of a fund to be used to reimburse employees injured in such employments, without regard to negligence or common-law liability therefor, and which provides that no employer shall be exempt from the burden imposed or waive the benefits of the act by a contract, and that any contract shall be void *pro tanto*, is not unconstitutional as an unlawful interference with the right of contract, since the liberty to contract is not absolute, and means absence from arbitrary restraint, and not immunity from reasonable regulations and prohibitions enforced in the interests of the community by public policy.⁵⁸

⁵⁶ *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

⁵⁷ *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

The Illinois Workmen's Compensation Act (Laws of 1911, p. 315, J. & A. ¶ 5449), is not unconstitutional as depriving the employee of liberty and property, nor as subjecting him to unreasonable search and seizure, nor as impairing his right

to contract and his right of waiver. *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 5 N. C. C. A. 401.

⁵⁸ *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

Section 3 of the Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), provides that if, by or on behalf of the employer, any request, suggestion or demand be made that an employee, or one seeking employment, shall exercise

Provisions that, where both the employer and the employee reject the act, the liability of the employer shall be the same as though the employee had not rejected; that, if the employee rejects, the employer may plead and rely upon "any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk, and fellow-servant," with certain limitations; and that compensation under the act is to be awarded only if both have accepted the act are not invalid on the ground that the act contained an improper classification and an arbitrary differentiation in that if the employer and employee both reject the act, the employee none the less takes the benefit of the act, and that where the employer accepts and the employee rejects, the latter gets as much as the former, whatever differences there are as to the consequences of similar conduct on the part of the employer and employee being sustained by the generally accepted doctrine that the freedom to contract is only in theory enjoyed by the employee as fully as by his employer, and that the police power may be invoked to sustain some differentiations in favor of the employee, on the theory that this is a method of protecting him for the public good against the actual inequality between him and his employer.⁵⁹

The exactions and restrictions of the compensation acts being authorized by the fundamental law, it cannot be contended

his right to reject the act, there shall arise a conclusive presumption that the employee or applicant was unduly influenced to exercise this right; that the rejection, made under such circumstances, shall be conclusively presumed to have been procured through fraud, and be null and void. *Held*, that this section is not objectionable as interfering with the freedom of contract, since, if there can be a valid workmen's compensation act, the legislature may make provision against having the

legislative intent as to such act thwarted. *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

The section of a workingmen's compensation bill which provides that no agreement by an employee waiving his right to compensation under such bill shall be valid, is constitutional. *In re Opinion of Justices*, 209 Mass. 607, 1 N. C. C. A. 557.

⁵⁹ *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 157 N. W. 145, 11 N. C. C. A. 886.

that either the employer or the employee is thereby deprived of liberty or property without due process of law.⁶⁰

⁶⁰ California Workmen's Compensation, Insurance and Safety Act (St. 1913, p. 279), known as the Boynton Act, superseded the Roseberry Act, so called (St. 1911, p. 796), the former being elective, while the provisions of the latter are compulsory is not obnoxious to the "due process of law" and the "equal protection of the laws" clauses of the Fourteenth Amendment to the Federal Constitution; for, if legislation may fairly be regarded as necessary or proper for the protection and furtherance of a legitimate public interest, under the police power, the mere fact that it may hamper private action, is not a ground for nullifying such act. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 10 N. C. C. A. 1.

The Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), is not unconstitutional on the ground either that it violates the guaranties of due process of law and of equal protection of the laws or that it effects a wrongful abridgement of the privileges and immunities of citizenship. *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

A workingmen's compensation bill, which is not compulsory in character as applied to employers and employees, does not violate any provision of the Federal or State Constitutions concerning the taking of property without due process of law. Hence the Massachusetts Act, which provides that, in an action for injury to or death of an employee, it shall be no defense that he was negligent, or that he assumed

the risk, or that the injury was caused by the negligence of a fellow employee, is not invalid as authorizing the taking of property without due process of law. In *re Opinion of Justices*, 209 Mass. 607, 1 N. C. C. A. 557.

The New York Workmen's Compensation Act (Consol. L., c. 67; L. 1914, c. 41), does not infringe the Fourteenth Amendment of the Federal Constitution, by taking property without due process of law. *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A. 1916A 403.

The Miners' Compensation Act (Laws 1909, Chap. 67), which provides a scheme of accident insurance and benefits for persons engaged in mining coal within the state, and which requires the funds to be provided by payment of one per cent. of the wages of such persons and a tax on the employers of one cent per ton for each ton of coal mined, is in the nature of an occupation or license tax, and therefore the plan provided for its collection is not invalid as taking property without due process of law. *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 1 N. C. C. A. 720.

Section 2 of the New Jersey Employers' Liability Act of April 4, 1911 (P. L. p. 136) provides that compensation shall be made "without regard to the negligence of the employer" when the employer and employee shall by agreement, either express or implied, accept the provisions of section 2, and where the personal injury or death for which compensation is sought is the re-

§ 1365. **Same subject; right to jury trial.** The right to trial by jury is not absolute in the sense that it has universal application,⁶¹ and, so far as proceedings in the state courts are concerned, it is not protected by the Federal Constitution, which has reference only to the administration of the federal laws in the federal courts.⁶² Therefore, it can be waived, and the waiver need not be in express terms.⁶³ The right applies only to judicial proceedings and cannot be claimed in an inquiry of a nonjudicial character, or with respect to proceedings before an administrative board.^{63a} Accordingly compensation acts have uniformly been held not to be invalid as depriving either the employer or the employee of the right to a trial by jury, the inquiry conducted thereunder being of a nonjudicial character before a purely administrative tribunal.⁶⁴

sult of an accident arising out of and in the course of the employment, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury. The section further provides that, with respect to contracts of hiring made after the act becomes effective, it shall be presumed that the parties are acting under section 2 if one or the other does not then or before the accident expressly elect to operate under section 1. *Held*, that such provisions of section 2 are not in violation of the "due process of law" provision of the Fourteenth Amendment. *Sexton v. New-ark Dist. Tel. Co.*, 84 N. J. L. 85, 3 N. C. C. A. 569.

The Texas Workmen's Compensation Act (Laws 1913, c. 179) is not contrary to the prohibition contained in the Fourteenth Amendment of the United States Constitution against the denial of equal protection of the laws, nor of the prohibition contained in that amendment and also in the Texas Consti-

tution, art. I, § 19, against the taking of property or deprivation of liberty without due process of law. *Memphis Cotton Oil Co. v. Tolbert*, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547; *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873. See, however, *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 1 N. C. C. A. 517, 34 L.R.A.(N.S.) 162, where the first New York Act was declared unconstitutional as a deprivation of property without due process of law.

⁶¹ *Hunter v. Colfax Consol Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁶² *Hunter v. Colfax Consol Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁶³ *Hunter v. Colfax Consol Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

^{63a} *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

⁶⁴ *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 5 N. C. C. A. 401; *Hunter*

Of course, an employer who has rejected the act when sued by an injured employee in an action at law is entitled to a jury trial, if the right is properly asserted.⁶⁵

§ 1366. **Same subject; right to judicial remedies.** What is known and denominated as the cause of action arising from an accidental injury is purely the creation of the common law; it is a common-law liability founded upon the common-law doctrine of negligence, and, but for the rule of the common law—sometimes also expressed in statutes—there would be no liability for such an injury, and hence no cause of action for it.⁶⁶ Hence, in denying the employee of a subscribing employer, or his beneficiaries, any cause of action for accidental injuries, the compensation acts simply change the common-law rule of liability on the subject,⁶⁷ as the right to have the liability of an employer for an accidental injury to an employee determined by the common-law doctrine is not a constitutional immunity, and, since employers who become subscribers under the act voluntarily waive the right to have their liability determined in the courts, it cannot be held that the act deprives them of fundamental rights and is therefore unconstitutional.⁶⁸

v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886; *Cunningham v. Northwestern Improvement Co.*, 44 Mont 180, 1 N. C. C. A. 720; *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 3 N. C. C. A. 569; *Middleton v. Texas Power & Light Co., — Tex. —*, 185 S. W. 556, 11 N. C. C. A. 873; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

⁶⁵ The Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147) does not deny to an employer who rejects the act the right to trial by jury but merely changes the rules under which such trial shall proceed. *Hunter v. Colfax*

Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁶⁶ *Middleton v. Texas Power & Light Co., — Tex. —*, 185 S. W. 556, 11 N. C. C. A. 873.

⁶⁷ *Middleton v. Texas Power & Light Co., — Tex. —*, 185 S. W. 556, 11 N. C. C. A. 873.

The New York Workmen's Compensation Act (Consol. L., c. 67; L. 1914, c. 41) does not unconstitutionally deprive an employee of his right of action for injuries imputable to his employer's negligence. *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A. 1916A 403.

⁶⁸ *Middleton v. Texas Power & Light Co., — Tex. —*, 185 S. W. 556, 11 N. C. C. A. 873.

Under the Texas Bill of Rights, which provides that "every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law," the legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another,⁶⁹ but as the injuries or wrongs with which the Texas Act deals are those which are accidental and not those which are intentional, this provision cannot be invoked to defeat the validity of the act as to employees.⁷⁰

The constitutional right to appeal to the courts for redress of wrongs is not denied by a compensation act which establishes a board of awards by which the right of claimants to participate in a state insurance fund is determined, where an appeal lies to the courts from its decision, and an injured employee may, in the first instance, waive his claim under the act and sue in court for his damages.⁷¹ And notwithstanding the provisions in the acts relative to procedure, the structure of the law of the land and the inherent power of the courts enable the latter to interfere, if the arbitration committee exceeded its jurisdiction, to inquire whether the act was being enforced against one who had rejected it, whether the claiming employee was an employee, whether he was injured at all, whether his injury was one arising out of his employment, whether it was due to his intoxication or was self-inflicted, or, acceptance being conceded, whether an award different from the statute schedules had been made, whether the award was tainted with fraud on the part of the prevailing party, or of the arbitration committee, and whether such committee attempted judicial functions in violation of or not granted by the act.⁷²

The legislature cannot validate a contract the parties to which agree to be bound by a statutory delegation of judicial power if

⁶⁹ *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

⁷⁰ *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

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⁷¹ *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A.(N.S.) 694.

⁷² *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

the Constitution puts the exercise of all judicial power in the courts, nor can it authorize a contract ousting the courts of such jurisdiction as the fundamental law gives to the courts exclusively;⁷³ but to provide by contract for the arbitration of special matters does not oust the jurisdiction of the courts so long as the ultimate question at issue may be litigated in the courts.⁷⁴

The legislature is without power to deny a citizen the right of making a defense when sued in the courts.⁷⁵

So also, a vested right of action given by the principles of the common law is a property right and is protected by the Constitution as is other property.⁷⁶

§ 1367. Same subject; impairment of obligation of contracts. Parties *sui juris* and at liberty can make new contracts that modify or annul existing ones without running counter to any constitutional inhibition, and whenever any liability is left on which to contract, a new contract or a change in contract made by contract cannot be objected to as an invalid impairment.⁷⁷ Hence, where the acceptance of a workmen's compensation act is elective, such act cannot work an impairment of the obligation of contracts.⁷⁸

Many acts expressly exempt existing contracts and, in such cases, of course, it cannot be contended that the obligation of a contract is impaired,⁷⁹ but even contract obligations are not proof against proper exercises of the police power, and it has accordingly been held that the fact that an act applies to existing contracts does not invalidate it.⁸⁰

⁷³ Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁷⁴ Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁷⁵ Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

⁷⁶ Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

⁷⁷ Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁷⁸ Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁷⁹ Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁸⁰ The Workmen's Compensation Act (Wis. Laws, 1911, c. 50; stat. §§ 2394-1 to 2394-32) is intended to apply to all employers and employees, including persons employed

Courts will labor diligently to avoid a construction which imputes to a statute the impairment of existing obligations, and will hold that that is not the true interpretation if any other is in reason attainable.⁸¹

§ 1368. Same subject; compulsory acts. Compulsory features of the compensation acts have been sustained,⁸² and the fact that the act is elective as to the employer but compulsory as to the employees does not render it unconstitutional.⁸³

Since the nonacceptance of the Iowa Act does not impose upon an employer any greater burden than the legislature could have imposed in any event, the act is not unduly compulsive.⁸⁴

under contracts of service made prior to the passage of the statute and not expiring until some definite date subsequent to the statute, but the obligations of such contracts are not thereby impaired. *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A.(N.S.) 489. See also *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

Section 1 of the Employers' Liability Act of April 4, 1911 (P. L. p. 134), allows a recovery only in cases where the employee can show that his injuries were caused by an accident "arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause," and "provided the employee was himself not wilfully negligent," and abolishes the common-law defenses of assumption of risk and the fellow-servant rule. *Held*, that, in modifying or abolishing such defenses to an action for an injury sustained after the act became effective, the section does not violate the "due process of law" and "equal protection of the law" provisions of the Fourteenth Amendment of the Fed-

eral Constitution, nor does it impair the obligation of contracts, in violation of the State and Federal Constitutions. *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 3 N. C. C. A. 569.

But see *State ex rel Yaple v. Creamer*, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A.(N.S.) 694, holding that contracts in existence and unexpired at the time a workmen's compensation act is put into operation by an employer cannot be affected or impaired by it.

⁸¹*Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁸²*Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 10 N. C. C. A. 1; *State v. Clausen*, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 3 N. C. C. A. 599.

⁸³*Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 556, rev'g. — Tex. Civ. App. —, 178 S. W. 956, 9 N. C. C. A. 847; *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A.1916A 403.

⁸⁴*Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

Where a compensation act expressly gives to employer and employee a free choice as to whether he will accept its terms or not, and provides as to those employers only who do accept that the defenses of assumption of risk and negligence of fellow-servants shall be abrogated, it cannot be said that the law is coercive, nor that the employee, if the law is accepted by his employer, will feel compelled to accept through fear of discharge if he does not accept, such matters being purely speculative and conjectural for which a statute cannot be declared invalid.⁸⁵

§ 1369. Same subject; provisions governing partial invalidity. Many of the acts contain provisions to the effect that the invalidity of any part of the act shall not affect the validity of any other portion, nor the act as a whole. The constitutionality of such provisions has been sustained since anything that might have been eliminated by the legislature can properly be eliminated by the courts, if it is unconstitutional, without affecting the balance of the act; ⁸⁶ and, in such cases, the invalidity of any part of the act which is not such as to defeat the operation of the act as a whole, will not invalidate the entire act.⁸⁷

§ 1370. Same subject; tax provisions. The taxing power may not be used as a subterfuge to accomplish that which is not legitimately for such power, and the exercise of the taxing pow-

⁸⁵ *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

⁸⁶ *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A. (N.S.) 466.

⁸⁷ Since the Texas Workmen's Compensation Act expressly declares that the holding of any portion thereof invalid shall not affect the remainder of the act, the unconstitutionality of that portion making it obligatory on employees whose employers elect to be governed by the act, without the consent of the former, does not invalidate the act as to consenting employees. *Middleton v. Texas Power & Light Co.*, —

Tex. Civ. App. —, 178 S. W. 956, 9 N. C. C. A. 847, rev'd on other grounds, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

Even if so much of the Texas Workmen's Compensation Act (Laws 1913, c. 179) as provides for the insurance of employees is unconstitutional as violating Texas Constitution, art. XII, §§ 1 and 2, requiring that creation of private corporations be by general laws, such unconstitutionality would not render the remaining provisions of the act unconstitutional. *Memphis Cotton Oil Co. v. Tolbert*, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547.

er, no matter in what form, can be sustained only where the exaction is, in the sense of the law, for a public use;⁸⁸ but it is not a sufficient ground for holding a tax invalid that in a sense it is to be used for what is both a private and a public benefit, or that others than the taxpayers are benefited.⁸⁹ When the principles underlying the exaction of taxes to support public charities are borne in mind, it is not difficult to find a basis to sustain the acts as tax measures, in that their purpose is to prevent public dependency on the part of workmen injured and maimed through industrial hazards.

An act which assesses upon employers in extrahazardous employments certain sums based upon their payrolls for the purpose of creating a fund to reimburse all employees injured in such employments, without regard to negligence or common-law liability therefor, does not violate a constitutional provision that property shall be taxed according to its value in money and that all taxation shall be uniform, since such an act does not create a general tax, but is in the nature of a license tax only.⁹⁰

§ 1371. **Same subject; by whom and how constitutional question may be raised.** A person cannot complain of a statutory discrimination either when it is in his favor or when it imposes a burden on a class to which he does not belong.⁹¹ Hence, the employer cannot be heard to urge a grievance of the employee in attacking a workmen's compensation act.⁹² Thus, where no objection is raised by the employees that an act in limiting its application to employers having in service five or more workmen, is unconstitutional in that it discriminates against employees in the service of an employer employing less than five, the employer cannot be heard to object to its constitutionality on this ground.⁹³

⁸⁸ *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁸⁹ *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁹⁰ *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A. (N.S.) 466.

⁹¹ *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁹² *Hunter v. Colfax Consol. Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

⁹³ *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364, 7 N. C. C. A. 570.

In reviewing a judgment awarding compensation on account of the death of an employee under the act, an allegation that a provision that, in the employment of minors, certain portions of the act "shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor" is void, will not be considered when it appears that decedent was of age at the time of his death.⁹⁴

The question as to the constitutionality of an act may properly be raised upon an application for a writ of mandamus to the state auditor to compel the auditing of a warrant issued to the state treasurer in payment of a debt incurred by the Industrial Insurance Department created by such statute.⁹⁵

§ 1372. **Same subject; insurance provisions.** That the insurance provisions of a compensation act may have induced insurance associations to combine and to fix prohibitive insurance rates is not ground for holding that such provisions invalidate the act since, in the first place, if the rates have been made prohibitive, employers will reject the act and there will be no insurance taken, and the associations will automatically be brought to terms, and, in the second place, there are more direct and better methods of dealing with such a combine, if it actually exists, than by declaring the act void because it requires the employer to insure his liability.⁹⁶ Nor can such provisions be attacked on the ground that they work an illegal taxation of the employer, the tax, if it is a fact that one is imposed, being valid under the police power of the state.⁹⁷

An act which does not require liability insurance companies to insure risks thereunder, is not unconstitutional because it requires that such companies and policy holders, if policies are issued, shall be governed by the act so far as applicable.⁹⁸

Although the insurance association created by the Texas

⁹⁴ *Sexton v. Newark Dist. Tel. Co.*,
84 N. J. L. 85, 3 N. C. C. A. 569.

⁹⁵ *State ex rel. Davis-Smith Co.*
v. Clausen, 65 Wash. 156, 3 N. C.
C. A. 599, 37 L.R.A. (N.S.) 466.

⁹⁶ *Hunter v. Colfax Consol. Coal*

Co., — Iowa —, 154 N. W. 1037,
11 N. C. C. A. 886.

⁹⁷ *Hunter v. Colfax Consol. Coal*
Co., — Iowa —, 154 N. W. 1037,
11 N. C. C. A. 886.

⁹⁸ *In re Opinion of Justices*, 209
Mass. 607, 1 N. C. C. A. 557.

Workmen's Compensation Act is denominated a "corporation" by the act, it is not a private corporation, and the part of the act creating it has been held not violative of the constitutional provision that no private corporation shall be formed except by general laws.¹

§ 1373. **Conflict of laws.** The question as to what law governs may arise in different ways; thus it may be presented in connection with accidents occurring (1) within the state, and (2) without the state. Accidents occurring within the state may affect: (1) local employees, (2) employees who entered into the contract of employment in another state in which a compensation act is in force, and (3) employees from another state having no compensation act. Accidents occurring without the state may affect: (1) local employees, (2) employees of another state in which compensation acts may or may not be in force. As Mr. Bradbury says:

"The whole subject may be generally divided into two questions, namely:

"First. When may the authorities of a state enforce the compensation of their own state in relation to accidents which happen beyond the borders of their own state?

"Second. When may the courts of one state enforce the compensation of another state in relation to accidents which happen:

"(a) Within the boundaries of the state the law of which is sought to be enforced;

"(b) Within the boundaries of the state where the proceeding is brought; or

"(c) Within the boundaries of a third state?"²

It is thus seen that the Industrial Commission of a state may be called upon to enforce the local law as to an accident occurring in another state. Similarly, the courts of a compensation state may be presented with the question of enforcing the laws of another state to an accident occurring in a third state, or within the border of their own state. Again an employee en-

¹ Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

² See exhaustive article by Mr. Bradbury, 9 N. C. C. A. 918-932.

tering into a contract of employment in a compensation state may be injured in another state, and seek his remedy in a third state where no compensation act is in force.

In the light of these difficulties it is not strange that a conflict should arise as to whether compensation acts have extraterritorial effect. The earlier decisions declined to give them effect beyond the boundaries of the state.³ The later decisions adopt the broader view, however, that liability under the compensation acts is contractual in character, and hence, under familiar principles of the law of contracts, in determining the right to compensation the *lex loci contractus* applies.⁴

Where a contract of employment was entered into in New York and the employee was injured in New Jersey, the New Jersey courts applied the compensation act of that state, but, at the time, there was no compensation act in force in New York.⁵

The solution of the question would seem to depend upon whether liability under the acts is regarded as arising *ex contractu* or *ex delicto*. If the compensation act is regarded as part of the contract of employment and liability thereunder, therefore, contractual in character, it would seem that many of the difficulties attendant upon any other construction will be avoided. Domestic tribunals could then give extraterritorial force to their own or foreign acts as determined by the place where the contract was entered into.

§ 1374. **Existence of relation of master and servant.** Under compensation acts purporting to apply solely to master and servant, necessarily proof of the existence of the relationship is indispensable to the award of compensation. This is a question determinable in accordance with familiar principles. The term "master and servant" presupposes control on the part of

³ In re Gould, 215 Mass. 480, 4 N. C. C. A. 60; Keyes-Davis Co. v. Alderdyce, Detroit Legal News, May 3, 1913, 3 N. C. C. A. 639n. See also Johnson v. Nelson, 128 Minn. 158.

⁴ Spratt v. Sweeney & Gray Co., 168 N. Y. App. Div. 403, 9 N. C. C. A. 918; Kennerson v. Thames Tow-

boat Co., 89 Conn. 367, L.R.A.1916A 436; Edwardsen v. Jarvis Lighterage Co., 168 N. Y. App. Div. 368; Post v. Burger & Gohlke, 216 N. Y. 544, 10 N. C. C. A. 888.

⁵ American Radiator Co. v. Rogge, 86 N. J. L. 436, 7 N. C. C. A. 144.

the master and, to that extent, subordination upon the part of the servant. Therefore, where the element of control is absent, the relation does not exist and the act does not apply.⁶ But, on the other hand, where the employer has power to direct the manner of performance by the employee, in other words, to control the performance of the work, the act applies,⁷ and it matters

⁶ *Gilmore v. Sexton*, 1 Cal. Ind. Acc. Comm. Dec. (No. 17, 1914) 5, 7 N. C. C. A. 1084n; *Rose v. Pickrell*, 1 Cal. Ind. Acc. Comm. Dec. (No. 6, 1914) 7 N. C. C. A. 1085n; *Curtis v. Plumptre*, [1913] W. C. & Ins. Rep. 195, 6 B. W. C. C. 87, 7 N. C. C. A. 1085n; *Hayden v. Dick*, 5 F. 150, 40 Sc. L. R. 95, 7 N. C. C. A. 1085n; *In re Johns*, Ohio, Ind. Comm., No. 50,018, Oct. 22, 1914, 7 N. C. C. A. 1085n; *McGregor v. Dansken*, 1 F. 536, 36 Sc. L. R. 393, 7 N. C. C. A. 1086n; *McDermott v. Grindol & Sons*, Ill. Ind. Bd., Aug. 3, 1914, 7 N. C. C. A. 1086n; *Vamp- lew v. Parkgate Iron & Steel Co.*, [1903] 1 K. B. 851, 72 L. J. K. B. 575, 88 L. T. 756, 51 W. R. 691, 67 J. P. 417, 19 T. L. R. 421, 7 N. C. C. A. 1087n; *Simmons v. Faulds*, 65 J. P. 371, 17 T. L. R. 352, 7 N. C. C. A. 1087n; *Walsh v. Waterford Harbor Comr's*, [1914] W. C. & Ins. Rep. 16, 7 N. C. C. A. 1087n; *Busse v. Brugger*, Wis. Workm. Comp. Rep. (1914) 78, 7 N. C. C. A. 1087n; *McConnell v. Galbraith*, [1914] W. C. & Ins. Rep. 90, 7 N. C. C. A. 1088n; *Ryan v. Tipperary*, South Riding, County Council, [1912] W. C. & Ins. Rep. 195, 5 B. W. C. C. 578, 46 Ir. L. T. 69, 7 N. C. C. A. 1089n; *Reid v. Leitch Collieries, Ltd.*, 4 Alberta L. R. 338, 7 B. W. C. C. 1017, 21 W. L. R. 689, 2 W. R. 663, 10 N. C. C. A. 846n.

⁷ *Stevens v. Tittle*, 2 Cal. Ind.

Acc. Comm. Dec. (1915) 146, 10 N. C. C. A. 837n.

Plumber making repairs under direction of owner of house held a workman. *McNally v. Fitzgerald*, [1914] W. C. & Ins. Rep. 7, 7 N. C. C. A. 1080n.

In a proceeding under the Massachusetts Workmen's Compensation Act (St. 1911, c. 751), it appeared from the agreed statement of facts that the injured employee was employed by an electric light company as a tree trimmer; that the foreman under whose direction he worked was employed by the company and had also been elected to, and still held the office of tree warden of the town; that, on the day of the injury, the employee had gone out with the foreman and other employees of the electric light company to trim trees along the company's wires; that the foreman ordered them to trim some dead limbs from a tree on a lawn inside of the sidewalk, on the opposite side of the street from the company's wires, and in so doing the employee fell and was injured. Held, that, upon these facts, the Accident Board might have found that his injuries were received in trimming a tree in accordance with the orders of the company's duly authorized officer, and that at the time of the injury he was acting as an employee of the company, not of the town. In re

not that the employee may have been vested with a large amount of discretion⁸ or that his compensation was not certain and definite, but based upon the amount of his production,⁹ as where the relation is once established, the fact that compensation was payable in a lump sum or by the job cannot alter the existing status.¹⁰ Where the relation is shown, the fact that, at the time of the injury, the employee may have been loaned to a third person does not affect his status.¹¹

Howard, 218 Mass. 404, 5 N. C. C. A. 449.

⁸ Quarryman paid by day and directed where he was to work, but free to choose exact place in quarry where excavation should be made is a workman. *Paterson v. Lockhart*, 7 F. 954, 42 Sc. L. R. 755, 7 N. C. C. A. 1076n.

A workman, paid by the piece, paying his own traveling expenses and under no obligation to undertake any particular job, and, in fact, at liberty to, and occasionally accepting work from others, held a workman. *Taylor v. Burnham & Co.*, [1910] S. C. 705, 47 Sc. L. R. 643, 3 B. W. C. C. 569. (This is a very extreme application of the act, however.)

⁹ *Cangreme v. Alberta Coal Min. Co.*, 5 Alberta L. R. 173, 7 B. W. C. C. 1020, 22 W. L. R. 68, 2 W. W. R. 1058, 10 N. C. C. A. 850n.

Shipyard worker member of a squad paid on piece basis through squad leader, and subject to rules of employer held a workman. *McCready v. Dunlop*, 2 F. 1027, 37 Sc. L. R. 779, 7 N. C. C. A. 1078n.

Quarryman working on a piece basis, but under general direction of employer, held a workman. *Jones v. Penwyllt Dinas Silica Brick Co.*, [1913] W. C. & Ins. Rep. 394, 6 B. W. C. C. 492, 7 N. C. C. A. 1077n.

Painter and paperhanger working on piece basis, supplying tools in part and subject to general direction of employer as to place of work and manner of performance held to be within the English Act. *Lewis v. Stanbridge*, [1913] W. C. & Ins. Rep. 515, 6 B. W. C. C. 568, 7 N. C. C. A. 1080n.

¹⁰ *Rheinwald v. Builders' Brick & Supply Co.*, 168 N. Y. App. Div. 425, 10 N. C. C. A. 844n.

¹¹ A firm of contracting teamsters let out their teams with drivers to persons desiring their services. The firm contracted with another to haul sand and building material for him at a fixed price per team per day, which included the services of wagon, horses and driver. An employee of the contracting firm while engaged in taking on a load of sand or stone for another under a contract with his employer, was injured by his hand being caught in the jaws of a team shovel used in loading the wagon. In a proceeding under the New Jersey Workmen's Compensation Act of 1911, an award of compensation was made against the person contracting with the injured employee's employer. On appeal the court held this ruling was erroneous, as the wages of the injured employee were paid by the contracting firm, and the latter was consequently the employer within

In construing the compensation acts, the well-settled rules as to when the relation of independent contractor exists, apply, except perhaps that the courts seem somewhat more liberal in applying the principle of control. As was said in a recent case:

"The true test of a contractor would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it."¹²

The fact that the relation of the injured person was primarily that of independent contractor will not deprive him of the right to compensation, where, at the time of the injury, he had temporarily suspended that relationship, and was performing work actually under the control of the employer.¹³

Under the Massachusetts Workmen's Compensation Act, an employee of an independent contractor who is doing the work of a subscriber has the same rights against the subscriber's insurer as he would have were he working directly for the subscriber.¹⁴

The relationship of master and servant must also be distinguished from that of partnership or joint adventurer where the parties operate independently of control, except as to the division of the proceeds of the undertaking, as where the business or operations are conducted purely on a profit-sharing basis, the

the meaning of the act; and further the person hiring the services of the team, etc., had no direct dealings with the injured person, and had nothing to say as to the wages to be paid, the only contract made being for the supply of a team consisting of a wagon, horses and driver, for which he paid as a team. *Rongo v. R. Waddington & Sons*, 87 N. J. L. 395, 9 N. C. C. A. 402.

¹² *Powley v. Vivian & Co.*, 169 N.

Y. App. Div. 170, 10 N. C. C. A. 835.

¹³ Owner of dredge leasing same and controlling its operation, but injured at a time when he was not operating same, but was engaged in work which he did not control was, as to such work, an employee and not an independent contractor. *Powley v. Vivian & Co.*, 169 N. Y. App. Div. 170, 10 N. C. C. A. 835.

¹⁴ *In re Sundine*, 218 Mass. 1, 5 N. C. C. A. 616, L.R.A.1916A 318.

element of control being entirely lacking. Such operations are not within the act.¹⁵

While the relation of employer and employee, as defined by the act, must have existed at the time of the injury, it matters not whether the employment was under a valid contract as to both parties, or under a contract voidable at election of the employer.¹⁶ Thus, it has been held that the fact that the employment was secured in violation of law does not alter the rule.¹⁷

§ 1375. **Election.** Compensation acts may be roughly divided into compulsory, semi-compulsory and elective. Acts of the first class arbitrarily, in a sense, place all of the enumerated employments within the provisions of the acts, and all employers and their employees engaged in such occupations automatically come within the scope of the law without any action on their part.

¹⁵ *Sayers v. Gerard*, Cal. Ind. Acc. Comm. Dec. (No. 19, 1914) 48, 7 N. C. C. A. 1093n; *Ellis v. Joseph Ellis & Co.*, [1905] 1 K. B. 324, 74 L. J. K. B. 229, 92 L. T. 718, 53 W. R. 311, 21 T. L. R. 182, 7 N. C. C. A. 1092n; *Doggett v. Waterloo Taxicab Co.*, [1910] 2 K. B. 336, 79 L. J. K. B. 1085, 102 L. T. 874, 54 Sol. J. 541, 26 T. L. R. 491, 7 N. C. C. A. 1093n; *Pears v. Gibbons*, [1913] W. C. & Ins. Rep. 469, 6 B. W. C. C. 722, 7 N. C. C. A. 1094n; *Cole v. Shrubbsall & Wakeley Bros., Ltd.*, [1912] W. C. Rep. 226, 5 B. W. C. C. 337, 7 N. C. C. A. 1094n; *Smith v. Horlock*, [1913] W. C. & Ins. Rep. 441, 6 B. W. C. C. 638, 7 N. C. C. A. 1095n; *Boon v. Quance*, 102 L. T. 443, 3 B. W. C. C. 106, 7 N. C. C. A. 1095n; *Hughes v. Postlethwaite*, 4 B. W. C. C. 105, 7 N. C. C. A. 1095n; *Hoar v. Barge "Cecil Rhodes"*, 5 B. W. C. C. 49, 7 N. C. C. A. 1095n.

Evidence that a licensed driver operated a public taxicab, without control by the company owning the machine and that he received one-

fourth of the proceeds for his services, justifies a finding that he was a bailee of the cab rather than a servant, and, therefore, he was not entitled to an award under the workmen's compensation act for an injury sustained by him while driving the cab. *Smith v. General Motor Cab. Co., Ltd.*, [1911] App. Cas. 188, 1 N. C. C. A. 576.

¹⁶ Conductor claimed to have secured employment by false statement held an employee within the provisions of the act, the operation of an electric street railway being a hazardous employment, and the enforcement of the act was not dependent upon the validity of the contract of employment. *Kenny v. Union Ry. Co. of New York City*, 166 N. Y. App. Div. 497, 8 N. C. C. A. 986.

¹⁷ The Workmen's Compensation Act (N. Y. Consol. Laws, c. 67; Laws 1913, c. 816, re-enacted and amended by Laws 1914, c. 41, and amended by Laws 1914, c. 316) does not except from its benefits employees who have secured employment

As to such acts, of course, the question of election is of no importance.

Acts of a semi-compulsory nature become operative upon the acceptance of the act by either the employer or the employee. In most acts of this character, the choice of election to accept the act is placed solely in the hands of the employer, and his election to accept the act is binding upon the employee.¹⁸

In Arizona an extremely anomalous rule prevails.¹⁹ There probably owing to constitutional restrictions, the employee may elect to take under the act, to sue under the Employers' Liability Act of that state, or to sue at common law, and he is not required to exercise his election until after the injury.²⁰ The choice of election is vested solely in the employee, and his election is binding upon the employer, as to whom the act is compulsory in the event of the employee's decision to accept its provisions. A somewhat similar act is in force in New Hampshire, the employee being given the right to make his election after the injury.²¹

Probably the majority of the acts are purely elective, both the employer and the employee being given the right to reject, although the time for election or rejection is usually definitely fixed. The procedure is fixed by law. In some states, a definite acceptance of the act is required of all employers, and in others election is conclusively presumed as to certain occupations without affirmative action, in the absence of an express rejection in the manner prescribed by law.²² The employee is usually presumed to have elected to accept the act in the absence of a

in violation of section 939 of the Penal Law which makes it a misdemeanor to obtain employment under a false statement. *Kenny v. Union Ry. Co. of New York City*, 166 N. Y. App. Div. 497, 8 N. C. C. A. 986.

¹⁸ The Texas and New York Acts are probably the best illustrations of this type of enactment.

¹⁹ *Arizona Laws 1912 (First Special Sess.)* ch. 14.

²⁰ Consolidated Arizona Smelting

Co. v. Ujack, 15 Ariz. 382, 5 N. C. C. A. 742.

²¹ *Laws 1911*, ch. 163, § 4.

²² The election provided for in the Illinois Workmen's Compensation Act of 1911 (*Laws 1911*, p. 315, J. & A. ¶ 5449) is to be exercised to avoid being governed thereby, and not to cause the act to be applied. *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 5 N. C. C. A. 419.

definite rejection.²³ In such cases an election by the employee to accept the act is futile where the employer has rejected it.²⁴

An action at law by the employee does not constitute a final election of his remedy, where he recovered nothing and was relegated to the remedy provided by the act.²⁵ A general election to accept the act is an acceptance *in toto* notwithstanding an enumeration therein of the employments covered.²⁶

²³ *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 5 N. C. C. A. 419.

Under the Minnesota Workmen's Compensation Act (Laws 1913, c. 467; Gen. St. 1913, §§ 8195-8230), approved April 24, 1913, effective from October 1, 1913, an employee accepts the provisions of the act until he makes an election not to accept; under the proviso contained in § 12 of said chapter his election, made within 30 days after October 1st, is effective at once, notwithstanding the clauses of §§ 11 and 12 relative to a 30 days' notice; and an employee injured on October 15, 1913, perfecting his election not to be bound by the act on October 29, 1913, is, until that date, bound by the act, and cannot maintain a common-law action for his injury. *Harris v. Hobart Iron Co.*, 127 Minn. 399, 7 N. C. C. A. 44.

²⁴ Under the Illinois Workmen's Compensation Act of 1911 (Laws 1911, p. 315, J. & A. ¶ 5449), an employee cannot elect to be bound thereby unless his employer has previously elected to accept the act. *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 5 N. C. C. A. 419.

²⁵ An action brought by an injured employee in the superior court was not a final election of his remedy under the workmen's compensation act, nor was the Industrial Accident Commission deprived of

jurisdiction in the matter, nor the judgment of the superior court a final determination of the employee's rights in the matter, where the judgment of the superior court simply determined that the allegations of the complaint failed to state a case under the Workmen's Compensation, Insurance and Safety Act (Cal. L. 1913, c. 176), § 12 (b) of which provides that, where the specified conditions of compensation exist, the right to recover such compensation in a proceeding before the Industrial Accident Commission shall be the exclusive remedy of the employee except that when the injury is caused by the employer's gross negligence or wilful misconduct, the injured employee may, at his option, either claim compensation under the act or maintain an action at law for damages. Such employee, therefore, was not estopped from pursuing his remedy before the Industrial Accident Commission, nor was the commission without jurisdiction in the matter. *San Francisco Stevedoring Co. v. Pillsbury*, 170 Cal. 321, 9 N. C. C. A. 37.

²⁶ Acceptance in general terms by a railway company of the provisions of the Workmen's Compensation Act (Wis. Laws 1911, c. 50, secs. 2394-1 to 2394-31 Stats.), covered all the employees of the company, although the form of accept-

There is no cause of relief in equity nor ground for injunction, in a suit by an employee to restrain his employer from electing to come under the acts on the ground that, by such election, the employee would be obliged either to break his existing contract of employment or lose his common-law remedies, for his employer's torts, as, if the employer breaks his contract because the employee declines to accept the statute, the employee has adequate legal remedies for breach of contract, and, if the employee accepts the statute, he loses no vested or contract right and is not damaged, in the eyes of the law, by the change in his remedy for future torts.²⁷

The question of the effect of a rejection of the act upon the rights of both the employer and the employee is treated elsewhere.²⁸

§ 1376. Employments within the acts. The acts usually define the employments to which they shall apply, and occupations not within the enumerated scope are excluded. Many of the acts expressly exclude certain employments, such as agricultural pursuits, domestic labor and the like, while, under other acts, the application of the act is made to depend, in part, upon the number of persons employed.²⁹ Naturally the occupations sub-

ance specified the number of employees and places and nature of employment only as to those working in shops and offices. *Minneapolis, St. Paul & S. S. M. Ry. Co. v. Industrial Commission of Wisconsin*, 153 Wis. 552, 3 N. C. C. A. 707.

²⁷ *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

²⁸ See § 1360.

²⁹ Part A, § 1, of the Workmen's Compensation Act (Conn. Pub. Acts of 1913, c. 138), defines the employers' liability and abolishes the common-law defenses in actions for injuries sustained by an employee arising out of and in the course of his employment, or for death resulting from such injuries, and § 2

of part A provides that § 1 shall not apply to the employees of any employer having regularly less than five employees, or to casual employees, or to outworkers, nor to actions against any employer who shall have accepted part B of the act in the manner prescribed. Part B, § 1, provides for the payment of compensation where both employer and employee have accepted the provisions of the act and § 2 states when acceptance is conclusively presumed. In an appeal from an award of compensation to an injured employee, the employer claimed that the act was not applicable to employers having less than five employees, and that, if applicable, he incurred no liability thereunder because he

jected to the act are such as are common to the state passing the act, thus logging operations are not included within the Illinois Act, while they are expressly denominated hazardous employments in the Washington Act. This lack of harmony may result in difficult questions if the rule giving the acts extraterritorial effect is adhered to.³⁰ Thus, an employee entering into a contract of employment in Illinois may be sent by his employer to perform temporary work in Washington and, while there, may be injured in an "accident arising out of and in the course of his employment" in connection with logging operations. What is his remedy? If the Illinois Act applies, he must be relegated to his common-law right of action as the employment in which he was engaged is not within that act. On the other hand, if the Washington Act applies he must seek his remedy under the compensation act of that state. In such a case, it would seem more just to view the situation as though no compensation act were in force in Illinois, and to apply the law of the forum. In other words, since the employee was not within the terms of the Illinois Act, it could not be said that the parties contracted with reference to it, and, since there was no foreign contract regulating the terms of employment, the law of the forum would govern.

Casual employments are exempted from the provisions of many of the acts. Employment is not casual where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period.³¹ Employments within the usual course of business of the employer may be within the act, although casual. Thus, a city employee injured while loading gravel used by the city for improving and repairing its streets, was held to be

failed to comply with the provisions of § 30 of part B as to insurance of liability. *Held*, that §§ 1 and 2 of part B include every employer who has accepted part B, whether he regularly has five or less than five employees, and that such employer is conclusively presumed to

have accepted part B, unless he or the employee indicates refusal to accept. *Bayon v. Beckley*, 89 Conn. 154, 8 N. C. C. A. 588.

³⁰ See *ante*, § 1373.

³¹ *Sabella v. Brasileiro*, 86 N. J. L. 505, 6 N. C. C. A. 958.

within the act, although the employment may have been casual.³² Where one employed by an electric light company to trim trees under the direction of its foreman was injured while cutting dead limbs from a tree located on a lawn inside the sidewalk and across the street from the company's lines, the act being done under the foreman's orders, his employment was held not casual within the meaning of the Massachusetts Workmen's Compensation Act.³³ In Wisconsin, the defense of "casual employment" is available only by private employers, and cannot be asserted in behalf of a municipal corporation.³⁴

An infant, who, because of his age, could not be legally employed in any capacity is not within the act;³⁵ but an employee who may be legally employed, but not in the particular occupation in which he was engaged at the time of his injury has been held to be within the operation of the law.³⁶

The question as to whether municipalities and public corporations and their employees are within the act is to be determined from the act itself. Usually they are expressly included. But, even where they are included, public officers as distinguished from mere employees are not within the act. Many of the acts expressly define the terms "officers" and "employees," but, in the absence of such a definition, the question

³² State ex rel. City of Northfield v. District Court Rice Co., 131 Minn. 352, 11 N. C. C. A. 366.

³³ In re Howard, 218 Mass. 404, 5 N. C. C. A. 449.

³⁴ Brown v. City of Mauston, 1 Bul. Wis. Industrial Com. No. 3, p. 97, 3 N. C. C. A. 693n.

³⁵ Boy under fourteen employed in violation of statute held not a workman within workmen's compensation act. Hillestad v. Industrial Ins. Commission of Washington, 80 Wash. 426, 6 N. C. C. 763.

³⁶ Under Wis. St. subd. (2), § 2394-7, which brings within the meaning of the word "employee" as
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used in the Wisconsin Workmen's Compensation Law "minors who are legally permitted to work under the laws of the state (who, for the purposes of section 2394-8, shall be considered the same and have the power of contracting as adult employees)," a minor who may legally be employed to do any work at all is within the operation of such law without regard to the fact that his employer was penally liable for employing him to do the work at which he was engaged when he was injured. Foth v. Macomber & Whyte Rope Co., 161 Wis. 549, 11 N. C. C. A. 599.

must be determined in accordance with the rules of the common law, and the general laws of the state on the subject. Thus, under the Ohio and other acts, policemen are expressly included, while the Michigan Act does not refer to them in terms, and the Michigan Supreme Court holds that they are public officers and not employees.³⁷ The power of the municipality to engage in the particular employment carried on at the time of the injury may also be involved.³⁸ State institutions and boards are not within the act unless within the statutory enumeration.³⁹

³⁷ Under the Michigan Workmen's Compensation Act (Public Acts 1912, Act No. 10, part I, § 7, How. Ann. St., 2nd Ed. §§ 3939-4008), a policeman who is appointed under a charter provision of a city providing that the police department shall consist of the chief of police and as many subordinate officers, policemen and employees as shall be determined by the commission by ordinance, and who is required to take an official oath of office, is an "officer," and not an "employee" and hence comes within the exception of the act. *Blynn v. City of Pontiac*, 185 Mich. 35, 8 N. C. C. A. 793.

³⁸ A park caretaker, engaged in work under the direction of the park commissioners, died from injuries received while mowing grass outside of the park area and in a part of a street between the curb and the sidewalk. Under the statute (Laws 1907, c. 493, Wis. Stat. § 925-171a) the park commissioners were given jurisdiction and control for park purposes over that part of public streets between the curb and sidewalk, and there was also a city ordinance to the same effect. The Industrial Commission held that the case came within the

workmen's compensation act (L. 1911, c. 50) and awarded compensation to the widow of the deceased, which award was sustained by the trial court, it being held that the statute was not limited to parkings or paved streets, but applied to all public streets, and that the city had power to care for the grass plot at the place where deceased was injured. On appeal it was held that, while § 925-171a, enacted in L. 1907, c. 493, which was an act of general nature as to cities, and was incorporated into the general city charter law, would indicate that it applied specially to cities incorporated under such law or which have adopted such law, § 925-2 must be regarded as restrained so as not to modify the general power granted later and made applicable to all cities, and the ruling of the trial court was sustained. *City of Superior v. Industrial Commission*, 160 Wis. 541, 8 N. C. C. A. 960.

³⁹ Neither the Michigan Agricultural College nor the State Board of Agriculture which has supervision of it is among the employers enumerated in the Michigan Workmen's Compensation Act (Pub. Acts 1912, Part 1, sec. 5) and the act is

Where charitable institutions are made subject to the act, or elect to be bound thereby, the question may arise as to whether inmates employed in the various occupations carried on are "employees" or "workmen" within the act. Where, in return for the care bestowed, the inmate is required to perform services possessing a monetary value, there would seem to be no good reason why he should not be regarded as an employee, especially is this true where the inmate receives compensation in addition to care, lodging, etc.⁴⁰ By far the greatest number of questions arise in connection with so-called hazardous employments. The employments deemed hazardous are enumerated in the acts, and, to be within them, the occupation must bear a substantial relation to the enumerated employments.⁴¹ But the act applies

not applicable to them in the absence of their election to come under it. *Agler v. Michigan Agr. College*, 181 Mich. 559, 5 N. C. C. A. 897.

⁴⁰ A blind pauper while working in the industrial department of a charitable institution met with an accident while filling a machine, his right hand being dragged into the machine and crushed, necessitating the amputation of the three middle fingers of his hand. The institution was not self-supporting but had to depend on charitable aid, receiving a certain annual amount from the pauper's parish, and another amount from a charitable fund. The workmen in the department were graded into three classes who were paid varying amounts of money for their work. The injured man was in the second class and the institution supplied him with board, lodging and clothing, and paid him 5 shillings a month. In arbitration proceedings under the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58), the arbitrator found that

applicant was in receipt of parochial and charitable relief, and, therefore, was not a workman within the meaning of the act. On appeal, the Court of Session held that appellant was a workman within the terms of the act, and that the monthly payments to members of his class in the institution being supposed to represent 20 per cent. of their average earnings, compensation was to be calculated on that basis. *MacGillivray v. Northern Counties Institute for the Blind*, [1911] Ct. of Sess. Cas. 897, 4 B. W. C. C. 429, 48 Sc. L. R. 811, 11 N. C. C. A. 77.

⁴¹ Among the hazardous employments specified in the New York Workmen's Compensation Law (Consol. L., c. 67; L. 1913, c. 816, as re-enacted and amended by L. 1914, c. 41 and c. 316) are: "Packing houses, abattoirs, manufacture or preparation of meats, or meat products, or glue" (section 2, group 30), and "Canning or preparation of fruits, vegetables, fish, or food-stuffs; pickle factories and sugar refineries" (section 2, group 33).

to workmen injured by accidents described therein while engaged in any of the employments enumerated, whether or not the in-

In a claim for compensation under the act it appeared that an employee was a butcher, or assistant to the chef at a hotel, his duty being to distribute meats to the cooks as ordered, and that, while boning a leg of mutton on the butcher block, his knife accidentally slipped and severed an artery in his groin, which resulted in femoral hemorrhage, and caused his death. The commission denied the claim, holding that the deceased was not engaged in a hazardous employment within groups 30 and 33 specified in section 2 of the compensation act. On appeal the decision was affirmed, the court adopting the construction of the law by the commission that the preparation of meats, and the preparation of foodstuffs, as the word "preparation" was used in section 2 of the compensation law, did not mean the ordinary preparation of meat or foodstuffs for cooking purposes, but involved a preparation by some mechanical device, or a preparation which either changed the form of the material to render it suitable for use, or changed the nature of the material for the same purpose. *De La Gardelle v. Hampton Co.*, 167 N. Y. App. Div. 617, 9 N. C. C. A. 703.

The Washington Workmen's Compensation Law (Laws 1911, c. 74, § 2) classifies among employments "inherently dangerous" and therefore "extra-hazardous," elevators. Section 3 defines certain terms and classes of business. "Mill" is defined to be "any plant, premises, room or place where machinery is used, etc., * * * including ele-

vators, warehouses and bunkers." Section 4 schedules the rates to be paid, but no schedule specifically covers freight or passenger elevators. In the same section under the subhead "Construction Work" industries are classified, and here are found the words "freight and passenger elevators," but the context and setting of the words indicate that this part of the statute means those engaged in the manufacture or work of construction of freight and passenger elevators. Under another subhead is found the classification "Grain Elevators." *Held*, that this latter classification brings § 4 into harmony with §§ 2 and 3, and renders it certain that there was no purpose to cover the operation of an ordinary freight or passenger elevator or to recognize it as an "extra-hazardous" occupation or as one inherently dangerous. *Guerrieri v. Industrial Ins. Commission*, 84 Wash. 266, 8 N. C. C. A. 440.

The loading and unloading of vessels is not within group 8 of section 2 of the New York Workmen's Compensation Act (Consol. L., c. 67; L. 1914, c. 41) providing compensation for the death or injury to employees engaged in "the operation, within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company." But such operations are within group 10 of section 2 providing compensation for the death or injury to employees engaged in "longshore work, including the loading or unloading of cargoes, or parts

juries were caused by the particular risk which induced the legislature to include those engaged in such employment in the operation of the act,⁴² and the mere fact that the particular occupation in which the injury occurred may have been merely incidental to the business of the employer, does not affect its character as a hazardous employment.⁴³

§ 1377. Accidents or injuries arising out of and in the course of employment; general rules. The English act which has been the basis for practically all American legislation upon the subject, requires that, to be compensable, the accident must arise "out of and in the course of employment." The British courts

of cargoes * * *, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage." *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A. 1916A 403.

In the provision of the New Hampshire Workmen's Compensation Act (Laws 1911, c. 163, § 1) rendering the act applicable to workmen engaged in work in any "mill, factory or other place," the word "mill" is to be construed as including not only the building in which the employer's business is carried on, but the dam, flume, yard and the ways provided for the use of the employees. *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 5 N. C. C. A. 840, L.R.A. 1916A 10.

⁴² *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 5 N. C. C. A. 840, L.R.A. 1916A 10.

A stableman for an express company whose duties are confined solely to the care of the horses, used by a company to draw the wagons operated by it, is employed in the "operation" of wagons drawn by horses within the meaning of section 2, group 41 of the New York Workmen's Compensation Act,

which entitles persons thus employed to compensation for injuries sustained, equally with the actual drivers of the wagons. *Costello v. Taylor*, 217 N. Y. 179, 11 N. C. C. A. 320.

The Workmen's Compensation Act (Wis. Laws of 1911, c. 50, secs. 2394-1 to 2394-31 Stats.) extends to railway employees other than those "working in shops or offices," and a railway company may accept the provisions of such act as to all its employees. *Minneapolis, St. Paul & S. S. M. Ry. Co. v. Industrial Commission of Wisconsin*, 153 Wis. 552, 3 N. C. C. A. 707.

⁴³ Under the Washington Workmen's Compensation Act (Laws 1911, c. 74), a repair shop operated by a department store company for the repair of its vehicles in which machinery is used, power-driven machinery employed, manual labor exercised, and over which place the company has control or to which it has right of access, is an extra-hazardous business, although it is merely incidental to the company's principal business. *Wendt v. Industrial Ins. Commission of Washington*, 80 Wash. 111, 5 N. C. C. A. 790.

construe the terms "out of" and "in the course of" as not being synonymous, and both conditions must appear.⁴⁴ While some of the American acts permit recovery where the injury merely arises "out of" the employment,⁴⁵ the majority of the acts follow the English act in this respect, and the construction placed upon the act by the British courts has been uniformly adopted. To warrant a recovery, therefore, it must appear that the employee's injury was caused by (a) an accident, (b) arising out of, and (c) in the course of, his employment. Even though the injury arose out of and in the course of the employment, if it be not an "accident" within the purview of the act, there can be no recovery. Even if there be an accident which occurred "in the course of" the employment, if it did not arise "out of the employment," there can be no recovery; and even though there be an accident which arose "out of the employment," if it did not arise "in the course of the employment," there can be no recovery.⁴⁶

At the outset, therefore, it becomes important to define the word "accident." An "accident," within the meaning of the compensation acts, denotes "an unlooked-for mishap or an untoward event which is not expected or designed."⁴⁷ The question whether or not an injury to an employee is an "accident"

⁴⁴ An accident in respect of which compensation is claimed under the English Workmen's Compensation Act of 1906 must be one arising "out of and in the course of the employment." *Astley v. R. Evans & Co., Ltd.*, [1911] 1 K. B. 1036, *aff'd* [1911] App. Cas. 674 (Eng.), 3 N. C. C. A. 239.

⁴⁵ The injuries for which compensation is to be paid, under the Wisconsin act, are such as are incidental to and grow out of the employment. *Hoenig v. Industrial Commission of Wisconsin*, 159 Wis. 646, 8 N. C. C. A. 192, L.R.A.1916A 339.

⁴⁶ *Bryant v. Fissell*, 84 N. J. L. 72, 3 N. C. C. A. 585.

⁴⁷ *Fenton v. Thorley & Co.*, [1903] App. Cas. 443, 72 L. J. K. B. 787, 89 Law Times Rep. 314, 19 Times Law Rep. 684, 5 W. C. C. 1, 3 N. C. C. A. 268n; *Bryant v. Fissell*, 84 N. J. L. 72, 3 N. C. C. A. 585.

The word "accident" is employed in its popular sense in the New Hampshire Workmen's Compensation Act (Laws 1911, c. 163, § 2) and means an untoward and unexpected event. *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 5 N. C. C. A. 840, L.R.A.1916A 10.

within the purview of the act is a mixed one of law and fact. When applied to ascertained facts, it is a question of law.⁴⁸

With respect to the necessity that the accident arise "out of and in the course of employment," the difficulty consists rather in the application than in the definition of the terms. Thus, it has been said that an accident arises "out of" the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it,⁴⁹ while an accident arises "in the course of the employment" if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.⁵⁰

In a proceeding under the act the obligation to pay compensation is absolute when the fact is determined that the injury arose out of and in the course of the employment. Hence, the single inquiry is whether, in fact, the injury did arise out of and in the course of the employment, and it is immaterial, if death ensues, whether that was the reasonable and likely consequence or not. In other words, the inquiry relates solely to the chain of causation between the injury and the death.⁵¹

Accidents arising in the course of the workman's performance of his duties arise "out of and in the course of his employment,"⁵² even though they were caused by the acts of stran-

⁴⁸ *Bryant v. Fissell*, 84 N. J. L. 72, 3 N. C. C. A. 585.

⁴⁹ *Bryant v. Fissell*, 84 N. J. L. 72, 3 N. C. C. A. 585.

⁵⁰ *Moore v. Manchester Liners, Ltd.*, [1910] App. Cas. 498, 3 N. C. C. A. 269n; *Smith v. Fibre Coal Co.*, [1913] 1 Scot. L. T. 263, [1913] W. C. & Ins. Rep. 343, 347, 3 N. C. C. A. 270n; *Bryant v. Fissell*, 84 N. J. L. 72, 3 N. C. C. A. 585.

⁵¹ *In re Sponatski*, 220 Mass. 526, 8 N. C. C. A. 1025, L.R.A.1916A 333.

⁵² In an action under the Workmen's Compensation Act, 1906 (6

Edw. 7, c. 58) to recover compensation for the death of a workman, it appeared that the deceased was a brakeman in charge of a train that was running buffer to buffer with and pushing another train towards siding points, and that in endeavoring to climb from the truck in which he was riding on to the brake van of the first train, he fell and was killed, and it was shown that it was the duty of the brakeman on the other train to open the points: *Held*, that there was evidence from which it could be inferred that the accident arose "out of and in

gers,⁵³ and although his act may have related to a sphere of the employment with which he was not directly connected.⁵⁴

The burden of furnishing evidence from which the inference can be legitimately drawn that the death of an employee was caused by an accident or injury arising out of and in the course of the employment is on the claimant.⁵⁵

Direct evidence of the manner in which the injury was sustained is not essential, it being sufficient if the inferences from the facts proved support the conclusion that the accident occurred while the employee was engaged in the performance of his duties.⁵⁶

the course of the employment," and that the dependents of the deceased were entitled to compensation. *Astley v. R. Evans & Co., Ltd.*, [1911] 1 K. B. 1036, *aff'd* [1911] App. Cas. 674, 3 N. C. C. A. 239.

⁵³ When the evidence permitted the court to find as a fact that decedent while at work for his employer as a journeyman carpenter, on a building in course of erection, was killed by the falling of a bar of metal from one of the upper stories, which was caused to fall by a workman of an independent contractor who had work on the same building, the court was justified in concluding that decedent's death arose "out of and in the course of his employment," within the purview of section 2 of the Employers' Liability Act of April 4, 1911 (P. L. p. 136). *Bryant v. Fissell*, 84 N. J. L. 72, 3 N. C. C. A. 585.

⁵⁴ In turning on the electric current in a repair shop in which he was working for the purpose of running a grindstone to sharpen his chisel, a carpenter was acting within the scope of his employment within the meaning of the Washington Workmen's Compensation Act (Laws 1911, c. 74), even though he

had nothing to do with the maintenance or operation of the power-driven machinery in the shop. *Wendt v. Industrial Ins. Commission of Washington*, 80 Wash. 111, 5 N. C. C. A. 790.

⁵⁵ *Hills v. Blair*, 182 Mich. 20, 7 N. C. C. A. 409; *McCoy v. Michigan Screw Co.*, 180 Mich. 454, 5 N. C. C. A. 455, L.R.A.1916A 323; *Bryant v. Fissell*, 84 N. J. L. 72, 3 N. C. C. A. 585.

⁵⁶ A workman whose duty it was to remove rubbish from racks in a flume which supplies water for his employer's mill, standing, while so doing, on an unrailed walk very near the river and using a rake, was seen performing this duty, his back being to the river. Some days afterward, his body was found down the river, bearing marks of having struck on rocks, and a broken rake handle was found in the water. It was held that the evidence warranted a finding that he was killed by an accident arising out of and in the course of his employment, and that the employer was guilty of negligence in failing to rail the walk. *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 5 N. C. C. A. 840, L.R.A.1916A 10.

§ 1378. **Same subject; disease.** The wording of the acts is not uniform; in some, provision is made for compensation for "accidental injuries"; in others, for "injuries by accidents arising out of" etc.; and in others for "injuries" or "personal injuries" omitting the word accident entirely.

The question whether incapacity or death was due to disease or to an accident or injury within the act is not free from difficulty. Although certain industrial diseases are expressly included within the British Act, by the Amendment of 1907,⁵⁷ this is not true of the American acts, and it has been quite uniformly held that industrial diseases are not within the act unless expressly included.⁵⁸ However, the mere fact that disease may have been the immediate cause of incapacity or death will not prevent compensation where it was proximately caused by an accident or injury within the act. This rule has been applied to nervous shock,⁵⁹ heart disease,⁶⁰ muscular spasm,⁶¹ pneu-

⁵⁷ Death of one employed as a gardener, laborer and caretaker, alleged to be the result of ptomaine poisoning from sewer gas breathed while obeying an order of his employer to find and open certain cesspools, on which work he was engaged four or five days, is not due to an "accident" arising out of or in the course of employment within the meaning of the English Workmen's Compensation Act of 1906, so as to entitle his widow to claim compensation thereunder, in absence of proof indicating the exact time, circumstances, place, and cause of the accident, since such disease is not an "industrial disease" scheduled in the act concerning which the applicant is not required to present such proof. *Eke v. Hart-Dyke*, [1910] 2 K. B. 677, 3 N. C. C. A. 230.

⁵⁸ The condition known as "lead poisoning" which is a disease, and the disability resulting therefrom, is

not one for which the commission is authorized to pay compensation out of the state insurance fund to employees "that have been injured in the course of their employment." *In re Brown*, Ohio Ind. Comm. Bul., No. 11656, 8 N. C. C. A. 1089, aff'd 92 Ohio St. 309.

Lead poisoning is an occupational disease and not an accidental injury within meaning of the Michigan Workmen's Compensation Act for which compensation may be awarded. *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, 6 N. C. C. A. 482, L.R.A.1916A 283.

⁵⁹ A nervous shock sustained by a workman engaged in coal mining caused by excitement and alarm resulting from a fatal accident to a fellow workman engaged in the same employment, is a "personal injury by accident arising out of and in the course of the employment" within the Workmen's Compensation Act of 1906. *Yates v. South Kirkby, F. &*

monia,⁶² blood poison,⁶³ typhoid fever,⁶⁴ and other germ dis-

H. Collieries, Ltd., [1910] 2 K. B. 538, 3 N. C. C. A. 225.

⁶⁰ A workman employed as cook on a lighter, who was suffering from valvular disease of the heart, in attempting to save some of his clothes and a surveying instrument when the lighter commenced to sink, so aggravated the disease by his exertions and the excitement that he died. It was held that his death arose out of and in the course of his employment. *In re Brightman*, 220 Mass. 17, 8 N. C. C. A. 102, L.R.A.1916A 321.

A workman, who was 50 years of age, had been employed at the respondents' tin sheds for 10 years, his work being to move tin plates in cases. On October 5, 1914, he had been working with some other men shifting heavy cases. In the afternoon, while they were moving lighter cases than they had had to move in the morning, he fell backwards and died almost immediately. A post-mortem examination established that cause of death was rupture of an aneurism of the aorta. The county court judge found that the death of the workman was the result of long-standing heart disease which reached its ordinary and fatal result while he was doing the lightest part of his ordinary day's work. He found that there had not been any "accident" within the meaning of the act and made his award in favor of the employers. *Held*, it was a misdirection to consider whether the rupture occurred when the deceased was or was not doing work of a light nature. An accident should have been found as soon as it was ascertained that the rup-

ture occurred by reason of the strain at work, however slight that strain might have been. *McArdle v. Swansea Harbor Trust*, 8 B. W. C. C. 489, 11 N. C. C. A. 175.

⁶¹ *Bystrom Bros. v. Jacobson*, 162 Wis. 180.

⁶² In a claim for compensation for the death of an employee from pneumonia, the question whether the pneumonia was caused by an accident arising out of and in the course of the employment is one of fact and the finding of the commission in the affirmative will not be disturbed where there is evidence to support it. *Bayne v. Riverside Storage & Cartage Co.*, 181 Mich. 378, 5 N. C. C. A. 837.

⁶³ An employee sustained a mortal injury from which death must sooner or later ensue, a fracture of the spine with severance of the spinal cord, causing complete paralysis of the lower limbs and a loss of power and sensation below the seat of the injury. He was placed in a hospital and under medical care. The nature of the injury compelled him to lie in bed in one position as a result of which a bed sore developed and from it he contracted blood poisoning, or septicæmia, which was the immediate cause of his death. *Held*, that his death resulted from the injury, septicæmia being merely a contributory cause, and compensation was properly allowed. *In re Burns*, 218 Mass. 8, 5 N. C. C. A. 635.

While an employee was engaged in shaving and painting poles in the course of his employment, he accidentally caught his hand between one of the poles and a piece of tim-

eases; but the relation of the disease to the injury must be shown with reasonable certainty.⁶⁵ A pre-existing diseased condition rendering one more vulnerable to injury will not bar compensation.⁶⁶ Rupture or hernia when shown to have arisen from the employment is compensable.⁶⁷

ber, whereby the flesh was bruised and a small piece of skin knocked from the back of his hand. A few days later inflammation and suppuration set in, the same being produced by poisonous germs entering the flesh through the break in the skin. It was impossible to ascertain the source of the germs or when they gained entrance to the wound, the time which elapsed between the abrasion and the beginning of severe pain and suppuration was the usual period of the infection for the disease commonly known as blood poisoning. It was held that the disability attending this disorder was proximately caused by the injury and abrasion of the skin, and that the employee was entitled to compensation therefor under the California Workmen's Compensation Act. *Great Western Power Co. v. Pillsbury*, 171 Cal. 69, 11 N. C. C. A. 493.

⁶⁴ *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, L.R.A.1916A 273.

⁶⁵ Particles of steel from a lathe lodged in the operator's eye. On removal of the particles it was discovered that the eye had become infected with gonorrhea. The claimant contended that the injury from the steel was the inciting cause because it caused an inclination to rub and also because it gave rise to an inflamed condition rendering the eye susceptible to the entry of germs. Testimony of the medical witnesses showed that a normal eye

could easily be infected by rubbing it with a hand infected with gonorrheal germs. *Held*, that the evidence did not show that the injury was one arising out of and in the course of claimant's employment within the meaning of the Michigan Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10, How. Ann. St. 2d Ed. § 3939). *McCoy v. Michigan Screw Co.*, 180 Mich. 454, 5 N. C. C. A. 455, L.R.A. 1916A 323.

⁶⁶ Where a workman is employed in a wood-working shop furrowing posts and his occupation subjects his abdomen to unusual pressure, which produces internal hemorrhage, resulting in his death, a finding that his death was the result of an accident arising out of and in the course of his employment is warranted, even though the parts on which the pressure was exerted were already diseased and weakened by cancer. *Voorhees v. Smith Schoonmaker Co.*, 86 N. J. L. 500, 7 N. C. C. A. 646.

⁶⁷ Proof of apparent previous good health, a heavy and unusual lift in the course of work, discovery of rupture on the second day thereafter, death from surgical operation for relief thereof, and opinion of the operating surgeon that the rupture was caused by the lifting, is sufficient to establish accidental injury in the course of employment, within the meaning of the act. *Poccardi*, Royal Consul of

§ 1379. **Same subject; wilful misconduct.** Where other conditions permitting recovery are shown, it can only be barred by proof that the injury was the result of the wilful misconduct, or, as provided in most acts, the "serious and wilful misconduct," of the workman.⁶⁸ Under most of the American acts, intoxication constitutes such misconduct,⁶⁹ and this is true of the British act also;⁷⁰ but, under the latter, intoxication will not bar compensation where death or serious and permanent disability results.⁷¹ Serious and wilful misconduct is to be distinguished from negligence and gross negligence and resembles closely the wanton or reckless misconduct which will render one liable to a trespasser or bare licensee.⁷² It is more than gross or culpable negligence, and involves the intentional doing of something either with the knowledge that is likely to result in serious injury or with a wanton and reckless disregard of its prob-

Italy v. Public Service Commission, 75 W. Va. 542, 8 N. C. C. A. 1065.

Evidence held sufficient to warrant finding that hernia suffered by employee was caused by accidental injury sustained in course of his employment even though a strangulation did not follow closely upon the occurrence of hernia. *Andreini v. Cudahy Packing Co.*, 1 Cal. Ind. Comm. (No. 10, 1914) 8, 6 N. C. C. A. 390.

⁶⁸ Where the plaintiff in an action under the Workmen's Compensation Act for British Columbia has proved that she was dependent upon the deceased and that he came to his death during his employment, the defendants, to escape liability, must prove that the injury which caused death was attributable solely to the wilful misconduct or serious negligence of the deceased. *British Columbia Sugar Refining Co. v. Grannick*, 44 Can. Sup. Ct. 105, 2 N. C. C. A. 852.

⁶⁹ Under the terms of the Rose-

berry Act (Cal. L. 1911, p. 796) an act providing a system of compensation for accidental injuries to employees, the liability of the employer exists only where there is a concurrence of certain conditions, one of which is the absence of wilful misconduct. If the injury occurred through the employee's wilful misconduct, there is no liability, and the Industrial Accident Board has no power to assess compensation. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 9 N. C. C. A. 466.

But see *Nekoosa-Edwards Paper Co. v. Industrial Commission of Wisconsin*, 154 Wis. 105, 3 N. C. C. A. 661n, L.R.A.1916A 348.

⁷⁰ *Williams v. Llandudno Coaching & Carriage Co., Ltd.* [1915] 2 K. B. 101, 9 N. C. C. A. 245.

⁷¹ *Williams v. Llandudno Coaching & Carriage Co., Ltd.*, [1915] 2 K. B. 101, 9 N. C. C. A. 245.

⁷² *In re Nickerson*, 218 Mass. 158, 5 N. C. C. A. 645.

able consequences.⁷³ If an accident occurs while the workman is acting within the scope of his authority, and is doing an act which it was part of his duty to do, and the accident arises from his being engaged in doing that act and being thereby exposed to a special risk beyond that of other persons not so engaged, the employer is liable to pay compensation although the workman is doing the act negligently or contrary to rules laid down for his guidance.⁷⁴ The fact that an employee was injured while disobeying orders is not conclusive on the question of serious and wilful misconduct, but his act must have been deliberate, not merely thoughtlessly done on the spur of the moment,⁷⁵

⁷³ *In re Burns*, 218 Mass. 8, 5 N. C. C. A. 635.

An employee's death is none the less compensable under the New Jersey Workmen's Compensation Act because of the fact that the fatal accident was due to the employee's wilful negligence. *Taylor v. Seabrook*, 87 N. J. L. 407, 11 N. C. C. A. 710.

⁷⁴ *Williams v. Llandudno Coaching & Carriage Co., Ltd.*, [1915] 2 K. B. 101, 9 N. C. C. A. 245.

⁷⁵ *In re Nickerson*, 218 Mass. 158, 5 N. C. C. A. 645.

An employee engaged to do cleaning, painting and whitewashing, some of it near machinery and shafting, had been directed to do the latter work during the noon hours, when the machinery was stopped. At about 11:30 in the forenoon of the day he was injured, the superintendent, replying to a question from him about the work on a wall near moving shafting, told the employee that the work was to be done during the noon hour, that it was then about 11:30 and that he would find out the correct time and report it to the employee. About five minutes later, the employee started working at the

place indicated and was caught in the shafting and received injuries resulting in his death. *Held*, that he was not guilty of serious and wilful misconduct, within the meaning of the Massachusetts Workmen's Compensation Act (St. 1911, c. 751, part 2, § 2) preventing the award of compensation. *In re Nickerson*, 218 Mass. 158, 5 N. C. C. A. 645.

A servant's hand was injured while picking cotton from a carding machine which injury was followed by infection causing his death. It appeared that cotton collected on the guard of the finisher, and unless removed, caused an imperfection in the product, and that it was the operator's duty to pick it off while the machine was in motion. It was near this guard that the accident happened. It also appeared that the machinery was so delicate that the mere placing of the hand on it at places would cause it to dump and thereby interfere with its operations. *Held*, (1) that the evidence was sufficient to justify the finding of the Industrial Accident Board that the sign "Hands Off" placed on the machines by the manufacturer was put there, not as a warning against danger, but to prevent

particularly is this true where it is not clear that the orders were understood.⁷⁶ The question as to what constitutes serious and wilful misconduct, within the meaning of the act, is generally a question of fact, and the finding of the Industrial Accident Board in regard thereto will not be disturbed when not unwarranted by the evidence.⁷⁷

§ 1380. **Same subject; acts of nature.** The question as to whether injuries caused by acts of nature such as lightning,⁷⁸

people from disturbing the operation of the machine, and (2) that other signs posted in the room to the effect that "Cleaning machinery while in motion positively forbidden," did not have reference to picking cotton from the machines while in motion, where it was caught on parts of the machine but not in a dangerous place, especially as this was part of the operator's duty. *Redfield v. Michigan Workmen's Compensation Mut. Ins. Co.*, 183 Mich. 633, 8 N. C. C. A. 889.

Where an experienced lineman violated the employer's posted rules enjoining the use of rubber gloves by linemen when working with high-power or "hot" electric wires, which gloves were provided by the employer, and disobeyed the order of the foreman to use such gloves, and while at work on such wires without using gloves the employee came in contact with a wire and received a shock causing his death, it was held that he was guilty of wilful misconduct, and a finding by the Industrial Accident Board to the contrary was not supported by the evidence. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 9 N. C. C. A. 466.

⁷⁶ In an action brought by a widow under the Workmen's Compensation Act of British Columbia

for the death of her husband, who was employed by defendant by the day and who could understand little or no English, and who was found dead crushed between the ceiling and the cage of an elevator which he had been ordered in English not to run until he was acquainted with the same, evidence held insufficient to support a finding of wilful and serious misconduct. *British Columbia Sugar Refining Co. v. Granick*, 44 Can. Sup. Ct. 105, 2 N. C. C. A. 852.

⁷⁷ In *re Nickerson*, 218 Mass. 158, 5 N. C. C. A. 645; In *re Burns*, 218 Mass. 8, 5 N. C. C. A. 635.

⁷⁸ A driver for an ice company was required to follow a fixed route, in substantial disregard of weather conditions, though permitted to seek shelter in times of necessity. When a severe rain storm, accompanied by lightning, was in progress he left his team and went to a tall tree just within the lot line, either for protection or in the performance of his duties soliciting orders. Lightning struck the tree, and the same bolt struck him, and he was killed. It was held that the evidence sustained a finding that the death of the decedent was the result of an accident "arising out of" his employment within the meaning of the workmen's compensation act (*Laws*

heat,⁷⁹ or cold,⁸⁰ are compensable would seem to depend upon whether the workman's employment was such as to increase the hazard. If his occupation was such as to subject him to a risk of such injury beyond that to which persons not so engaged were exposed, there would seem to be no valid reason for denying compensation.

§ 1381. Same subject; sportive acts. Unless there is a causal relation between the injury and the employment, there would seem to be no sound reason for allowing compensation to an employee injured by the sportive or playful act of a fellow workman, wholly disassociated from the employment. The

1913, c. 467, § 9; Gen. St. 1913, § 8203). *State ex rel. People's Coal & Ice Co. v. District Court Ramsey Co.*, 129 Minn. 502, 9 N. C. C. A. 129, L.R.A.1916A 344.

The finding of the Industrial Commission that a workman who was killed by lightning while at work was not exposed to a hazard from lightning stroke peculiar to the employment and that the injury did not arise out of the employment cannot, under the Wisconsin act, be disturbed on appeal where there is substantial basis in the evidence to warrant the finding. *Hoenig v. Industrial Commission of Wisconsin*, 159 Wis. 646, 8 N. C. C. A. 192, L.R.A.1916A 339.

⁷⁹ Engineer dying as result of heat prostration while on duty held to have died of accident arising out of and in course of employment. *Maskery v. Lancashire Shipping Co. Ltd.*, [1914] W. C. & Ins. Rep. 290, 6 N. C. C. A. 708.

⁸⁰ The fact that other men working with an employee whose foot was frozen as the result of exposure to intense cold for ten hours in the course of his employment were not affected, is not sufficient to absolve

an employer from liability under the Quebec Workmen's Compensation Act, on the theory that the injury was not an accident but the result of ill health rendering the employee peculiarly susceptible to the cold, and the loss of a portion of an employee's foot as the result of it freezing where he was exposed to intense cold for ten hours in the discharge of his duties, is an "accident" within the meaning of the act. *Canada Cement Co. v. Pazuk*, 22 Quebec K. B. 432, 12 D. L. R. 303, 7 N. C. C. A. 982.

The employment of a journeyman baker to drive a cart for the purpose of delivering loaves of bread and receive payment therefor from his master's customers, does not expose the servant to any peculiar danger from cold, beyond that to which a large section of the population whose occupation is out of doors is ordinarily exposed, so as to entitle him to claim compensation under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58) for injury to his hand caused by frostbite. *Warner v. Couchman*, [1911] 1 K. B. 351, 80 L. J. K. B. 526, 1 N. C. C. A. 51.

British courts deny compensation in such cases.⁸¹ The American courts have not gone so far as to deny compensation in all cases where the injury was the result of the sportive act of another.⁸²

§ 1382. **Same subject; suicide.** Suicide like any other injury is compensable when it follows as the proximate sequence of an injury which would itself have been compensable. Where there follows, as a direct result of a physical injury, an attack of insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy "without conscious volition to produce death, having knowledge of the physical consequences of the act," there is a

⁸¹ *Fitzgerald v. Clarke & Son*, [1908] 2 K. B. 796, 1 B. W. C. C. 197, 99 Law Times Rep. 101, 77 L. J. K. B. 1018; *Mullen v. D. Y. Stewart & Co., Ltd.*, [1908] Ct. of Sess. Cas. 991, 45 Sc. L. R. 729, 1 B. W. C. C. 204; *Wilson v. Laing*, [1909] Ct. of Sess. Cas. 1230, 46 Sc. L. R. 843, 2 B. W. C. C. 118; *Shaw v. Wigan Coal & Iron Co.*, 3 B. W. C. C. 81; *Cole v. Evans, Son, Lescher & Webb, Ltd.*, 4 B. W. C. C. 138; *Wrigley v. Nasmyth, Wilson & Co.*, [1913] W. C. & Ins. Rep. 145.

⁸² Where a workman, while engaged with others in operating a trip hammer, attempted to remove a tin can placed on the lower die by a bystander and his hand was crushed, held that the injury sustained arose out of and in the course of his employment within the meaning of section 1 of the Illinois Workmen's Compensation Act of 1912 (J. & A. ¶ 5449), though the bystander placed the can on the die for fun, it appearing that the workman took no part in the fun but proceeded to clear the die of the obstruction so that he could continue the work. *Knopp v. Ameri-*

can Car & Foundry Co., 186 Ill. App. 605, 5 N. C. C. A. 798.

Where a plumber engaged on a job at a private dwelling quit work about five o'clock and went to his employer's shop, and, while passing to a bin to get fittings for the job, dodged the arm of a fellow workman thrown out in a spirit of fun, and in doing so slipped and fell on a descending concrete floor, whereby he received injuries from which he died, it was held that the accident arose out of his employment within the New Jersey Workmen's Compensation Act. *Hulley v. Moosbrugger*, 87 N. J. L. 103, 8 N. C. C. A. 283.

Where workmen were forbidden to use compressed air to clean their clothes, and a workman, in violation of the rule, upon quitting work, proceeded to clean his clothes with a hose containing compressed air, when a fellow workman in a spirit of fun applied the nozzle of the hose to his rectum causing a rupture of the intestines, it was held that the injury was not compensable. *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341.

direct and unbroken causal connection between the physical injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary wilful choice determined by a moderately intelligent mental power which knows the purpose and physical effect of the suicidal act even though choice is dominated and ruled by a disordered mind, then there is a new independent agency which breaks the chain of causation arising from the injury.⁸³

§ 1383. Same subject; intermission from or suspension of work. In considering what is sufficient evidence of a fatal accident, in an action to recover compensation under the act, to justify an inference that the accident arose "out of and in the course of the employment," a distinction must be drawn between cases where death occurs at a time when the workman is engaged in his employer's work and cases where death occurs at a time when the workman is free, without any breach of contract, to do what he pleases on his own account.⁸⁴ As at common law, a mere temporary cessation or suspension of work will not place a workman outside the protection of the act,⁸⁵ but the

⁸³ Evidence held sufficient to sustain the finding of the Industrial Board that decedent "while insane as a result of the injury," threw himself from the window and was fatally injured, and that there was no conscious volition of the act. In re Sponatski, 220 Mass. 526, 8 N. C. C. A. 1025, L.R.A.1916A 333.

⁸⁴ In an action under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), to recover compensation for the death of a workman, where the workman was engaged in his employer's work up to the time of his death, and the last acts known about him were consistent with the continuance of that work, the onus was on those who alleged a cessation of his work for his employer, to prove it (Per Fletcher Moulton, L. J.). *Astley v. R. Evans* Suth. Dam. Vol. V.—23.

& Co., Ltd., [1911] 1 K. B. 1036, aff'd [1911] App. Cas. 674, 3 N. C. C. A. 239.

⁸⁵ A drayman whose duties took him into the streets for twelve hours continuously away from his home and his employers' place of business, while going his proper rounds, stopped opposite a public house. He left his dray, crossed the street to the public house, got one glass of ale there, and in re-crossing the street to his dray was run over and killed. He was not away from his dray for more than two minutes: *Held*, that the street risk he ran was one incidental to his employment, and that, under the circumstances of the employment, he was entitled 'so to procure reasonable liquid refreshment, and that the accident therefore arose "out of and

rule is otherwise if the workman, in fact, undertakes the performance of an act wholly outside the scope of his employment.⁸⁶ It has been held that an employee's injury arose "out of and in the course of" her employment, within the meaning of the act, though received after she had left her employer's work-room to go to luncheon and was on a stairway not under the control of her employer nor of the subscriber for whom he was working, but which was the sole means of access to the employer's work-room.⁸⁷

§ 1384. Same subject; assaults. The earlier decisions of the British courts were in conflict as to whether injury from

in the course of" the employment within section 1, subsection 1 of the English Workmen's Compensation Act of 1906. *Martin v. John Lovibond & Sons, Ltd.*, [1914] 2 K. B. 227, [1914] W. C. & Ins. Rep. 76, 5 N. C. C. A. 985.

⁸⁶ A stationary engineer employed to run the engine and dynamo in the basement of the building in which he was employed, left the engine room to go to the upper floors of the building. He walked up the stairway to the second floor and there met employees engaged in other parts of the building, whom he offered to take up on the elevator. The men entered the elevator which passed one floor in safety, but, as it was passing the next floor, the employee sustained injuries resulting in his death. *Held*, that deceased, at the time of the injury, being away from his work and performing a voluntary act for his own pleasure or satisfaction was engaged in an act outside the scope of his employment, that the injuries causing his death did not arise out of and in the course of his employment, and that compensation therefor was not recoverable under the Michigan Workmen's

Compensation Act. *Spooner v. Detroit Saturday Night Co.*, — Mich. —, 153 N. W. 657, 9 N. C. C. A. 647.

⁸⁷ *In re Sundine*, 218 Mass. 1, 5 N. C. C. A. 616, L.R.A.1916A 318.

But see *Hills v. Blair*, 182 Mich. 20, 7 N. C. C. A. 409 which was an application for compensation under the Michigan act for the death of a workman employed as a section hand. It appeared that when the crew stopped work about noon to eat their dinner, the deceased, who had not brought his dinner with him as was customary, received permission from the foreman to go to his house for it. His house, which was less than half a mile away, could be reached by going on the highway, but deceased went along the track, as the railroad employees usually did. As he was leaving, the foreman warned him of an approaching train. As he was going along the track, the train overtook him, throwing him against a switch stand near the track and causing his death. It was held that the evidence was not sufficient to support a conclusion of law that the injury arose out of and in the course of the employment.

assault was compensable. The uncertainty was cleared up by a decision of the House of Lords holding that such injuries were the result of an "accident" within the act. In that case, a schoolmaster was killed in an attack by students which was the outgrowth of a conspiracy on their part. Compensation was allowed to the mother of the deceased.⁸⁸ Prior to this decision, the Irish⁸⁹ and English⁹⁰ courts of appeal had reached the same conclusion while the Scottish Court of Session held that such injuries were not within the act. It is now thoroughly established in Great Britain that injuries to an employee growing out of an assault are compensable where they arise out of and in the course of the employment.⁹¹ This rule has also been adopted by the American courts.⁹²

§ 1385. Dependency. In case of the death of an employee, the award provided for in the act is payable only to his dependents. The question as to who are dependents,⁹³ and the extent

⁸⁸ *Trim Joint Dist. School v. Kelly*, [1914] W. C. & Ins. Rep. 359, 136 L. T. J. 605, 6 N. C. C. A. 1010n.

⁸⁹ *Anderson v. Balfour*, [1910] 2 Ir. R. 497, 3 B. W. C. C. 588, 3 N. C. C. A. 275.

The murder and robbery of a cashier while traveling in a railway carriage to a colliery with a large sum of money for the payment of his employers' workmen, is an "accident" from the standpoint of the person murdered and arises "out of" his employment, and, therefore, his widow is entitled to receive compensation under the Workmen's Compensation Act of 1906. *Nisbet v. Rayne & Burn*, [1910] 2 K. B. 689, 3 N. C. C. A. 268.

⁹⁰ *Murray v. Denholm & Co.*, [1911] S. C. 1087, 48 Sc. L. R. 896.

⁹¹ Assault on foreman resulting in his death by applicant to whom he had refused position held to

arise out of employment. *Weekes v. William Stead, Ltd.*, [1914] W. C. & Ins. Rep. 434, 6 N. C. C. A. 1010.

⁹² The death of a mill superintendent who was fatally shot by a trespasser when, following an express instruction of his superior, he ordered him out of the mill, held to have been the result of an injury "arising out of and in the course of" his employment within the meaning of the Massachusetts Workmen's Compensation Act. In *re Reithel*, 222 Mass. 163, 11 N. C. C. A. 235, L.R.A.1916A 304.

⁹³ In an action for compensation for accidental injuries under the Workmen's Compensation Act of 1911, proof that plaintiff's mother has no property, that plaintiff and his sisters take care of her and that they all keep house together, held sufficient proof that there were persons dependent on plaintiff. *Stevenson v. Illinois Watch Case*

of the dependency⁹⁴ are ordinarily questions of fact, which must be established by the evidence,⁹⁵ except where the relation is such as, under the act, creates a presumption of dependency.⁹⁶

Co., 186 Ill. App. 418, 5 N. C. C. A. 858.

Dependent as used in the New Jersey Act means dependent for the ordinary necessities of life. *Jackson v. Erie R. Co.*, 86 N. J. L. 550, 6 N. C. C. A. 944.

Wife living voluntarily apart from husband and earning her own living as a dependent under English Compensation Act, *New Monckton Collieries, Ltd. v. Keeling*, [1911] A. C. 648, 80 L. J. K. B. 1205, 105 L. T. 337, 27 T. L. R. 551, 55 Sol. J. 687, 4 B. W. C. C. 332, 6 N. C. C. A. 240.

⁹⁴ In a proceeding under the Massachusetts Workmen's Compensation Act (St. 1911, c. 751) to recover compensation for the death of a sister, there was evidence that the sister whose dependency was in question had long been an invalid; that she was liable to die suddenly at any time; that she had a life interest in a house and land which were worth about \$2,000. There was no evidence as to the cost of the upkeep of the house nor whether or not it was incumbered. There was evidence that she and the deceased sister lived in the house. It was held that a finding of total dependency was not erroneous as a matter of law. *In re Buckley*, 218 Mass. 354, 5 N. C. C. A. 613.

Under the Massachusetts Workmen's Compensation Act (St. 1911, c. 751, pt. 2, § 6), where a minor employee turned over the whole of his earnings to his father, in awarding compensation for such employee's death, the amount paid by

the father for the employee's maintenance cannot be deducted. *In re Murphy*, 218 Mass. 278, 5 N. C. C. A. 716.

Where a daughter, eighteen years of age, had had no income for three years before her father's death, except a small amount allowed her by her father and a small compensation which she had earned for two weeks during such period, and she had saved one hundred dollars from the allowance given by her father, but since his death had used fifty or sixty dollars thereof, the evidence warranted a finding that she was wholly dependent upon her father at the time of his death. *In re Carter*, 221 Mass. 105, 9 N. C. C. A. 579.

⁹⁵ Proof of actual dependency upon a deceased employee must be made to entitle the applicant to compensation. *Miller v. Public Service Ry. Co.*, 84 N. J. L. 174, 3 N. C. C. A. 593n.

⁹⁶ In construing the provision of the Massachusetts Workmen's Compensation Act (St. 1911, c. 751, pt. 2, § 7, [a]) that a wife shall be conclusively presumed to be wholly dependent upon a husband "with whom she lives" at the time of his death, the ordinary acceptance in common understanding is to be given to the words "with whom she lives," and the presumption cannot be held to arise where the husband and wife were voluntarily living apart at the time of the injury, each earning a living, the husband having given her money at irregular intervals only. In such a case, the

§ 1386. **Notice.** Following the British act, the American acts usually require that notice of the accident be given to the employer "as soon as practicable," and, as a general rule, limit the period in which notice may be given. Failure to give such notice will not usually bar a recovery where it is shown that the employer was not prejudiced thereby,⁹⁷ or had knowledge

board must ascertain the extent of dependency. In re Nelson, 217 Mass. 467, 5 N. C. C. A. 694.

Evidence, in a proceeding under the New Jersey Workmen's Compensation Act to obtain compensation for the death of an employee, held not to rebut the presumption of the dependency of the deceased's widow and daughter. Taylor v. Seabrook, 87 N. J. L. 407, 11 N. C. C. A. 710.

The mother of a deceased employee is an "actual dependent" within the meaning of subdiv. 1 of section 12 of the New Jersey Workmen's Compensation Act of 1911. Blanz v. Erie R. Co., 84 N. J. L. 35, 3 N. C. C. A. 590n.

Proof of "total dependency" is dispensed with under the Wisconsin Workmen's Compensation Act of 1911 where the husband and wife are "living together" at the time of the death of the injured employee. Northwestern Iron Co. v. Industrial Commission of Wisconsin, 154 Wis. 97, 3 N. C. C. A. 670n, L.R.A.1916A 366.

⁹⁷ Where it appeared that a miner left home in apparently normal health on April 1, 1913, to go to work at the colliery, but later, when engaged in his work of moving full tubs from the working place to the shunt, was seen by two of the mine boys to sit down and rub his knee, and to limp when he walked, that

he complained to the boys that his knee hurt him and the boys helped him to shove the tubs, that on his return home that day he had a slight bruise and breakage of the skin on his knee, that the next day, his knee being sore and swollen, he did not go to work but the two following days he went to work as usual, that on the next day he called in a doctor, that on April 8th, one week after the injury, his wife saw the fireman at the colliery and told him that the injury to her husband was caused by one of the tubs, which injury accounted for his absence from work, that on April 9th the injured employee was taken to an infirmary where he died the next day from blood poisoning in the right knee, and that notice in writing of the accident was given to the employers on April 24th, held that the evidence was sufficient to sustain a finding that the accident occurred in the course of deceased's work at the colliery on April 1st and arose out of and in the course of employment; and that the employers had not been prejudiced in their defense by the absence of notice as required by the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58, § 2). Hayward v. West Leigh Colliery, Ltd., [1915] A. C. 540, W. C. & Ins. Rep. 233, 9 N. C. C. A. 966, rev'g [1914] W. C. & Ins. Rep. 21.

of the accident, either in person or through his agent.⁹⁸ Delay in giving notice in cases of inflammation,⁹⁹ cancer,¹ injuries to the eyes,² septic infection,³ heart disease,⁴ hernia,⁵ dermatitis,⁶ pyæmia and periostitis,⁷ slight injuries causing death,⁸ and injuries resulting from a second accident,⁹ has been held to bar compensation on the ground that such failure was not reasonably excusable and there was no showing of want of prejudice.

⁹⁸ State ex rel. City of Northfield v. District Court Rice Co., 131 Minn. 352, 11 N. C. C. A. 366.

Where the employer has actual knowledge of the happening of the accident and of the resulting injury, the giving of notice thereof is not necessary. State ex rel. Duluth Diamond Drilling Co. v. District Court St. Louis Co., 129 Minn. 423, 9 N. C. C. A. 1119.

The actual knowledge of the occurrence of any injury required by the workmen's compensation act does not mean the first-hand knowledge of an eyewitness, but what would be called knowledge in common parlance. In the case of a corporation, it means knowledge of the proper corporate agent. Allen v. City of Millville, 87 N. J. L. 356, 9 N. C. C. A. 749.

⁹⁹ Ford v. Gaiety Theatre, Ltd., [1914] W. C. & Ins. Rep. 53, 7 B. W. C. C. 197, 9 N. C. C. A. 967n.

¹ Potter v. John Welch & Sons, Ltd., [1914] 3 K. B. 1020, W. C. & Ins. Rep. 607, 7 B. W. C. C. 738, 9 N. C. C. A. 1035n.

² Fox v. Barrow Hematite Steel Co., Ltd., [1915] W. C. & Ins. Rep. 321, 9 N. C. C. A. 1035n; Miller v. Richardson, [1915] 3 K. B. 76, W. C. & Ins. Rep. 381, 9 N. C. C. A. 970n.

³ Dalgleish v. J. H. Gartside & Co., Ltd., [1914] W. C. & Ins. Rep. 319, 7 B. W. C. C. 535, 9 N. C. C.

A. 975n; Eydmann v. Premier Accumulator Co., Ltd., [1915] W. C. & Ins. Rep. 82, 9 N. C. C. A. 977n; Snelling v. Norton Hill Colliery Co., [1913] W. C. & Ins. Rep. 497, 9 N. C. C. A. 970n; Plumley v. Ewart & Son, Ltd., [1915] W. C. & Ins. Rep. 317, 9 N. C. C. A. 972n; Unger v. Howell, [1914] W. C. & Ins. Rep. 58, 7 B. W. C. C. 36, 9 N. C. C. A. 972n; Wassall v. James Russell & Sons, Ltd., [1915] W. C. & Ins. Rep. 88, 9 N. C. C. A. 1036n.

⁴ Ing v. Higgs, [1914] W. C. & Ins. Rep. 84, 7 B. W. C. C. 65, 9 N. C. C. A. 974n.

⁵ Nichols v. Briton Ferry Urban Dist. Council, [1915] W. C. & Ins. Rep. 14, 9 N. C. C. A. 974n.

⁶ Petschelt v. Preis, [1915] W. C. & Ins. Rep. 11, 9 N. C. C. A. 978n.

⁷ Coltman v. Morrison & Mason, Ltd., [1914] W. C. & Ins. Rep. 43, 7 B. W. C. C. 194, 9 N. C. C. A. 979n.

⁸ Hunt v. Highley Min. Co., Ltd., [1914] W. C. & Ins. Rep. 406, 7 B. W. C. C. 716, 9 N. C. C. A. 979n.

⁹ Lacey v. John Mowlem & Co., [1914] W. C. & Ins. Rep. 63, 7 B. W. C. C. 135, 9 N. C. C. A. 980n; Hodgson v. Robins, Hay, Waters & Hay, [1914] W. C. & Ins. Rep. 65, 9 N. C. C. A. 982n.

7 B. W. C. C. 232, 9 N. C. C. A. 980n; Taylor v. Nicholson & Son, Ltd., [1915] W. C. & Ins. Rep. 42,

On the other hand, delay in giving notice has been excused in cases where the injury remained latent and its seriousness did not become apparent until a considerable period had elapsed.¹⁰ The notice must be given to the person specified in the act.¹¹

§ 1387. **Award of compensation.** The amount of compensation to be awarded is prescribed by the acts, and depends upon the earnings of the injured employee, the nature of the injury

¹⁰ *Haward v. Rowsell & Matthews*, [1914] W. C. & Ins. Rep. 314, 7 B. W. C. C. 552, 9 N. C. C. A. 1030n; *Zillwood v. Winch*, [1914] W. C. & Ins. Rep. 87, 7 B. W. C. C. 60, 9 N. C. C. A. 1030n; *Thompson v. Northeastern Marine Engineering Co.*, [1914] W. C. & Ins. Rep. 13, 7 B. W. C. C. 49, 9 N. C. C. A. 1031n.

An employee, while engaged in his duties as stableman on December 2, 1913, struck his hand against the edge of a pail containing horse feed, which accident caused a small wound near the nail of the middle finger of his left hand. Verbal notice of the accident was given to the foreman on December 4, 1913 (who did not report same), and formal notice of claim on April 22, 1914. The arbitrator found (1) that the statutory notice was not given as soon as practicable; (2) that the employers were prejudiced by such want of notice; and (3) that the want of statutory notice was occasioned by mistake or other reasonable cause. The latter finding was based on the following facts: That the employee was illiterate and could neither read nor write; that, at the time of the accident, and for some time thereafter, he did not regard the injury as serious, the finger being treated at first by the doctor as a septic finger; that he continued at his work

for about three months; that in March, 1914, another doctor advised him to go to an infirmary, and, while a patient there, he began to consider the question of compensation; that his giving notice to the foreman and wearing a dressing on his finger while at work were circumstances inducing him to suppose that the accident was known to his employers; and that the disease with which he was affected was of an obscure character, there being some difference of medical opinion as to its precise character. On appeal from an award of compensation under the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58) a question of law was raised, namely, whether the employee was barred from maintaining proceedings for the recovery of compensation. *Held*, that where an employee labors under an error as to the seriousness of the injury suffered by him, such error is reasonable cause for not giving the required statutory notice of injury, and whether an employee is under such an error, is a question exclusively for the arbitrator to determine. *Flood v. Smith & Leishman*, [1915] 1 Sc. L. T. 340, W. C. & Ins. Rep. 212, 9 N. C. C. A. 1027.

¹¹ *Pimm v. Clement Talbot, Ltd.*, [1914] W. C. & Ins. Rep. 350, 7 B. W. C. C. 565, 9 N. C. C. A. 1040n.

and the extent of the resulting incapacity, being fixed at a certain percentage of such earnings. Awards of compensation in a lump sum are also authorized under certain circumstances.¹² The compensation provided for is not wages, but is in place of all the rights of action which belonged to the injured employee.¹³

Injuries resulting in permanent incapacity, either total or partial, are usually specifically scheduled, compensation being arbitrarily fixed at a certain percentage of the earnings of the employee for a definite period, the award in the case of partial permanent incapacity being in addition to such compensation as may be awarded during the period of total incapacity. It has been held that injuries not scheduled which do not impair the earning capacity of the employee are not within the act, and hence, an action at common law may be maintained therefor,¹⁴ although some of the acts specifically allow compensation for injuries causing disfigurement.¹⁵ Concurrent awards for distinct

¹² Multiplying the weekly minimum by the number of weeks and making the necessary credits is not a commutation, but an allowance of compensation in excess of that fixed by the New Jersey Workmen's Compensation Act of 1911, and it was error to commute the periodical payments to a lump sum on such a basis, as a deduction should have been made sufficient to make the lump sum equal to the present value of the periodical payments. *James A. Banister Co. v. Kriger*, 84 N. J. L. 30, 3 N. C. C. A. 585n.

¹³ *King v. Viscoloid Co.*, 219 Mass. 420, 7 N. C. C. A. 254.

¹⁴ Where an employee was injured by being bitten on the ear by one of the horses he was driving, his remedy was not under the workmen's compensation act, since the injury was not covered in the schedule of compensation for various disabilities (section 15), but his right to recover for the injury remained

as it was before the passage of the act. *Shinnick v. Clover Farms Co.*, 169 N. Y. App. Div. 236, 9 N. C. C. A. 342.

¹⁵ Where an employee sustained injuries resulting in the amputation of the fore-finger of his right hand at the second joint and also an injury to the thumb and was unable to return to work until fifteen weeks after the injury, when he was able to earn as much wages as before the injury, *held* that he was entitled to recover under paragraphs "a" and "b" of § 5 of the Workmen's Compensation Act of 1912, J. & A. ¶ 5453, and also under paragraph "c" of such section, for disfigurement of his hand. *Watters v. P. E. Kroehler Mfg. Co.*, 187 Ill. App. 548, 8 N. C. C. A. 352.

Where an employee, in operating a press, lost the tips of two fingers of his right hand, impairing the sense of feeling in those fingers and permanently incapacitating him in

injuries are not permitted under some of the acts,¹⁶ but, on the other hand, it has been held that, where the injuries resulting from the same accident are different in character, separate awards for each injury are proper.¹⁷

whole or in part from doing the particular kind of work in which he was engaged at the time of the accident, *held* that he was entitled to compensation for disfigurement of his hand under the provisions of clause C of section 5 of the Workmen's Compensation Act of 1911, J. & A. ¶ 5453. *Stevenson v. Illinois Watch Case Co.*, 186 Ill. App. 418, 5 N. C. C. A. 858.

¹⁶ A motorman in defendant's employ while standing on top of a trolley express car removing the trolley pole from its socket was injured by one end of the trolley pole coming in contact with the trolley wire while his right foot was against the socket, severely burning both hands and both feet, and injuring other parts of his body, the injuries necessitating the amputation of his right foot and temporarily totally incapacitating him from using his left foot or either hand. An award was made by the workmen's compensation commission, in proceedings under the workmen's compensation act (N. Y. L. 1914, c. 41), of two-thirds of the employee's weekly wages for 205 weeks for the loss of his right foot, and a further award of compensation for 14 weeks for disability caused by injuries other than to the foot. *Held*, that the claimant having, by the first award, been allowed compensation to the full amount for total disability, could not by the second award be allowed further compensation for total dis-

ability on account of other injuries arising out of the same accident, the second award to run concurrently with the first award, as concurrent awards are not permitted by the statute. *Fredenburg v. Empire United Rys.*, 168 N. Y. App. Div. 618, 9 N. C. C. A. 773.

The Michigan Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10, How. Ann. St. 2d Ed. § 3939) cannot be construed as meaning that where an employee loses a foot in an accident and also receives other injuries which disable him, he shall receive not only the specific indemnity provided for the loss of a foot but also during the same period, compensation for the disability from the other injuries. The compensation for the disability from the other injuries can be allowed only for such time, within the statutory limit, as it continues after the period for which indemnity is allowed for the loss of the foot. *Limron v. Blair*, 181 Mich. 76, 5 N. C. C. A. 866.

¹⁷ Where the fingers of an employee's right hand were crushed and fingers of the left hand were also injured causing an infection of the left hand, it was proper to allow the statutory damages for partial but permanent injury to the fingers, and also for the temporary disability from the infection, as the two injuries, although the result of the same accident, were different in character. *Nitram Co. v. Creagh*, 84 N. J. L. 243, 3 N. C. C. A. 587n.

Compensation for injury to a member can be allowed only as prescribed by the act,¹⁸ but the determining factor is the effect of the injury upon the member, and not necessarily the physical injury of the member itself.¹⁹ Where the injury affects different portions of the same member, compensation must be based upon the extent to which the member, as a whole, is affected.²⁰

Where the injury results in permanent disability, which is total merely because of the existence of some prior disability, such as the previous loss of an eye, reason would suggest that compensation should be based upon the theory of total disability. This appears to be the prevalent view.²¹ Owing to the express provisions of the Minnesota act, however, the supreme court of that state was compelled to take a contrary view.²²

¹⁸ The Massachusetts Workmen's Compensation Act (St. 1911, c. 751, pt. 2, § 11, as amended by St. 1913, c. 696) does not authorize an award of additional compensation given by reason of the nature and permanency of an injury consisting of the loss of two-thirds of the first phalange of the left index finger, even though the injury renders the phalange permanently incapable of use, where the entire finger is not incapacitated. *In re Ethier*, 217 Mass. 511, 5 N. C. C. A. 611.

¹⁹ Under the Massachusetts Workmen's Compensation Act, where an employee sustains a fracture of the spine and a severance of the spinal cord which result in a paralysis of the lower limbs and a loss of power and sensation below the seat of the injury, compensation is properly allowed for the permanent incapacity of both legs to the extent allowed by the act (St. 1911, c. 751, part 2, § 11, as amended by St. 1913, c. 696), although the feet and limbs themselves sustained no actual lesion. *In re Burns*, 218 Mass. 8, 5 N. C. C. A. 635.

²⁰ In a hearing under the work-

men's compensation act to ascertain the compensation to be awarded to an injured employee, where there are permanent injuries to the hand and arm below the elbow, the court should determine the percentage of total disability of the hand and fix the compensation accordingly. Where the same accident results also in permanent partial disability to the arm above the elbow, the court should determine the percentage of total disability of the arm as a whole, including the forearm and hand, and fix the compensation accordingly. It is improper in such a case to divide the injuries into two units, those to the hand, and those to the arm. *State ex rel. Kennedy v. District Court Clay Co.*, 129 Minn. 91, 8 N. C. C. A. 478.

²¹ *Schwab v. Emporium Forestry Co.*, 167 N. Y. App. Div. 614, 8 N. C. C. A. 1054n; *aff'd* 111 N. E. 1099 (mem. dec.); *Weaver v. Maxwell Motor Co.* (Mich.), 1 Nat. Comp. Journ. (No. 11, 1914) 6, 8 N. C. C. A. 1055n, *rev'd* 186 Mich. 588.

²² Prior to the time relator entered respondent's service he had

Under most acts the extent of the impairment of the employee's earning capacity is to be determined with reference to the employment in which he was working at the time of the injury, and, unless his earning capacity in that employment has been impaired, there can be no recovery for permanent disability,²³ and an "incapacity for work resulting from the injury" exists where, by reason of the injury, the employee is unable to procure employment, though he would be able to perform it if he could secure it.²⁴

A provision for the reduction of compensation in case of permanent injury to an employee who is over fifty-five years of age, is not to be construed as providing for a reduction of death benefits where the injury to an employee over fifty-five years of age results in death.²⁵ The computation of the average earnings of the employee is regulated by the acts. As a general rule, it is determinable by the earnings during a fixed period of employment by the same employer,²⁶ and, where the employment has

lost the sight of one eye by accidental means. After entering respondent's service he lost, by accident happening during the course of his employment, the sight of his other eye, thus rendering him totally blind. It is held that under section 15 of the compensation act the last employer is liable for a permanent partial disability only, for that was the extent of the injury which the employee suffered while in his service. *State ex rel. Garwin v. District Court of Cass Co.*, 129 Minn. 156, 8 N. C. C. A. 1052.

²³ Under the Wisconsin Workmen's Compensation Act, compensation cannot be awarded an injured employee because his injury, the loss of sight in one eye, may result in impairing his earning capacity in other employments. *International Harvester Co. v. Industrial*

Commission of Wisconsin, 157 Wis. 167, 5 N. C. C. A. 822.

²⁴ *In re Sullivan*, 218 Mass. 141, 5 N. C. C. A. 735, L.R.A.1916A 378.

²⁵ *City of Milwaukee v. Ritzow*, 158 Wis. 376, 7 N. C. C. A. 498.

²⁶ Where an employee had for a period of exactly 3 years before his death by accident arising out of and in the course of his employment been employed in the same employment of carter by the same employer, during which period he had been absent from work for 163 weekly days, 45 of which were unaccounted for, 35 of which he was sick, and 83 of which he was absent on account of injury, the longest period of absence being 6 weeks and 1 day on account of injury, it was held that the compensation payable was an amount equal to the actual earnings of the deceased during the said 3

not continued during the prescribed period, by the average earnings of persons in the same class in the same employment in the locality, if practicable.²⁷ Provision is also made for employments which are not continuous during the year, or where the rate of wages is not fixed.²⁸ The British act makes allowance for absence from work due to unavoidable causes, such as strikes,²⁹ illness,³⁰ and the like. Loss of employment due to

years, as provided by schedule 1, clause 1 (a) (i) of the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58). *Greenwood v. J. Nall & Co., Ltd.*, [1915] 3 K. B. 97, 8 B. W. C. C. 503, 84 L. J. K. B. 1356, 11 N. C. C. A. 787.

²⁷ *Andrejwski v. Wolverine Coal Co.*, 182 Mich. 298, 6 N. C. C. A. 807.

Where the condition of a long-shoreman is continuous labor in regular employment with different employers, the loss of his capacity to earn, as demonstrated by his conduct in such regular employment, is the basis upon which his compensation for injuries should be based under the clause in the Massachusetts Workmen's Compensation Act providing compensation on "average weekly earnings." *Gillen v. Ocean Accident & Guarantee Corporation*, 215 Mass. 96, 3 N. C. C. A. 612n, L.R.A.1916A 371.

²⁸ The New Jersey Workmen's Compensation Act (P. L. 1913, p. 313) enacts that the term "wages" shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident to the employee; that, where the rate of wages is fixed by the output of the employee, his weekly wages shall be taken to be six times his daily average earnings for a working day of

ordinary length, excluding overtime; and that this rate of weekly wages shall be calculated by dividing the total value of the employee's output during the actual number of full working days during the preceding six months by the number of days the employee was actually employed. Applied, where an employee, paid by the hour, was at the time of the injury earning twenty-five cents an hour and at other times more or less per hour, it being held that while the foregoing provisions were not precisely applicable, the language indicated that in a case where weekly wages were not fixed they shall be taken to be six times the daily wages, and that the daily wages shall be the wages for a working day of ordinary length, excluding overtime. *Smolenski v. Eastern Coal Dock Co.*, 87 N. J. L. 26, 9 N. C. C. A. 531.

²⁹ Where an employee had been employed by the same employer in the same grade of work for a year previous to his injury, and during that period his work had been interrupted by a strike in another trade to which his trade was related, it was held that such period of absence from work on account of the strike was unavoidable, there being no termination of the contract of employment, and was not to be included in the computation of aver-

slackness in trade apparently is not excluded.³¹ Payments to the employee to cover special expenses entailed upon him by the nature of the employment, and payments made by the employee, assistants are excluded in determining the average earn-

age weekly earnings, as such absence was within the meaning of schedule 1, cause 2(c) of the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58). *Griffiths v. Gilbertsens & Co., Ltd.*, 8 B. W. C. C. 548, 11 N. C. C. A. 666.

³⁰ Under schedule 1, clause 1(b) of the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58), provision is made for compensation in case of injury to an employee resulting in incapacity; under clause 2(a) "average weekly earnings" are to be computed in a manner best calculated to give the rate per week at which the injured employee was being remunerated; and under clause 2(c) "employment by the same employer" means in the grade in which the employee was employed at the time of accident, "uninterrupted by absence from work due to illness or any other unavoidable cause." *Griffiths v. Gilbertsens & Co., Ltd.*, 8 B. W. C. C. 548, 11 N. C. C. A. 666.

³¹ Where an employee had been employed by the same employer in the same grade of work for a year previous to his injury, and, during that period, his work had been interrupted by a docker's strike, and later there were trade fluctuations during a period of 9 weeks, involving a shut-down of the works for 4 weeks and a short-time schedule for 5 weeks, alleged to have been caused by the war, but it was found by the arbitrator that the trade slackness had commenced some considerable time before the war and was

not caused entirely by the war, and that it would have continued independently of the war, it was held that the period of absence from work on account of such trade slackness was not to be excluded from the computation of average weekly earnings, as such absence was not due to an unavoidable cause within the meaning of schedule 1, clause 2(c) of the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58). *Griffiths v. Gilbertsens & Co., Ltd.*, 8 B. W. C. C. 548, 11 N. C. C. A. 666.

On a proceeding under the Massachusetts Workmen's Compensation Act (Laws 1911, c. 751, as amended by Laws 1912, c. 571), it appeared that the employee had been re-employed by his employer, after his injury, and that, while so re-employed, the employer's mill was shut down for three and five-sevenths weeks on account of slack work. Thereafter, the employee filed a claim for compensation, and it was found that he was totally incapacitated during the time that the mill was shut down. It was found by the arbitration committee that the character of his injury, which consisted in the loss of all his fingers except the forefinger of the right hand and the little finger of his left hand, was such as to render it probable that he would not have been able to obtain work or earn anything elsewhere. It was held that the finding that he was totally incapacitated during the time the mill was closed was not unwar-

ings.³² An interesting question on the computation of the average earnings of an employee was recently decided by the Wisconsin Supreme Court. A police officer having difficulty in making an arrest called upon a citizen to assist him, and, rendering said assistance, the latter was shot and killed by the prisoner. Decedent's usual occupation was that of a plumber. Under the law, the police officer had power to require assistance in such cases and it was the duty of those called upon to obey. The court held that decedent's earnings were to be determined upon the basis of the compensation paid police officers in the locality rather than his usual earnings as a plumber.³³

Compensation may be terminated by the unreasonable refusal of the injured employee to submit to an operation, not dangerous to his life, which would have remedied his disability;³⁴ or malingering on his part;³⁵ or by the intervention of natural causes prolonging disability.³⁶

ranted. In re Septimo, 219 Mass. 430, 7 N. C. C. A. 906.

³² Where an employer pays to an employee having general charge of the affairs of the employer's business a fixed sum of money each month, from which the employee is required to pay an assistant, if one is employed by him to assist in the work, such sum as may be agreed upon between the employee and the assistant, the sum so paid the assistant forms no part of the salary or compensation of the employee, and in determining the salary of such employee the amount paid the assistant must be deducted from the total amount paid by the employer. *State ex rel. Gaylord Farmers Co-operative Creamery Ass'n v. District Court Sibley Co.*, 128 Minn. 486, 9 N. C. C. A. 86.

³³ *Village of West Salem v. Industrial Com.*, 162 Wis. 57.

³⁴ Refusal to submit to operation held unreasonable preventing fur-

ther compensation for incapacity resulting therefrom. *Walsh v. Locke & Co.*, [1914] W. C. & Ins. Rep. 95, 6 N. C. C. A. 675.

³⁵ A minor employee met with an accident in 1909 resulting in the loss of his right arm, for which a weekly compensation was paid until 1911 when, the employee having attained the age of 21 years, the compensation was increased. In June, 1914, the employers applied for a review on the ground that the employee was able to do light work. The evidence showed that, apart from the loss of his arm, the employee was a strong, healthy man, and was not totally incapacitated from earning wages; that in 1911 he had married; that he was in the habit of carrying baskets of pigeons for his brother-in-law; that he had never done any work since his accident; that in 1909 he had applied to the employers for light work which they were unable to give him;

The acts contain provisions making allowances for medical³⁷

and that, since that time, he had made no effort to get work of any kind. On appeal by the employee, the Court of Appeal sustained the decision of the county court judge, being of the opinion that the circumstances showed a bad case of malingering. *Silcock & Sons v. Golightly*, [1915] 1 K. B. 748, [1915] W. C. & Ins. Rep. 164, 11 N. C. C. A. 31.

On a proceeding for compensation under the Massachusetts Workmen's Compensation Act (Laws 1911, c. 751, as amended by Laws 1912, c. 571), where the Industrial Accident Board finds that the injured employee was totally incapacitated during a certain period, a finding of the arbitration committee that he made no effort to obtain employment during that period is immaterial. *In re Septimo*, 219 Mass. 430, 7 N. C. C. A. 906.

³⁶ An employee, 60 years of age, sustained injuries by being crushed by a fall of coal in the mine in which he was working, the accident having arisen out of and in the course of his employment. He was paid a weekly compensation for the total incapacity for about 3 years when the employers discontinued payment of compensation on the ground that the employee had recovered from the effects of the accident and was no longer incapacitated for work. An application for further compensation was denied, the arbiter finding that the employee had recovered from the direct effects of the accident although he was affected with partial incapacity for work, and that such partial incapacity was due to age and obesity, the physical condition

resulting from a natural tendency to obesity which was increased owing to his having done no hard work since the accident. *Held*, reversing the decision of the Court of Session, that the arbiter did not err in ending the compensation. *Clark v. George Taylor & Co.*, [1914] W. C. & Ins. Rep. 448, [1914] 2 Sc. L. T. 145, 11 N. C. C. A. 54.

³⁷ An injured employee reported his injury to his foreman who did not advise him as to his right to medical assistance. Later the employee went to the office of a physician who notified the employer's superintendent that he had such a patient, under the Massachusetts Workmen's Compensation Act (St. 1911, c. 751), but no attention was furnished in response. The notice to employees as to medical assistance which was posted in the employer's place of business was in English, a language which the injured employee could not read. *Held*, that the employee was entitled, under section 5 of the act, to recover the amount paid by him to the physician attending him the first two weeks after his injury. *In re Panasuk*, 217 Mass. 589, 5 N. C. C. A. 688.

Where there is evidence that an injured employee, applying for compensation under the California Workmen's Compensation, Insurance and Safety Act, was dissatisfied with the advice given him by the surgeon selected by the insurance carrier, that he notified the latter of his dissatisfaction, that he was directed by it to go to another surgeon, and that it was only after finding that such other surgeon was out of town that he went

and funeral expenses, also for attorney's fees.³⁸ But, under some of the acts, allowance cannot be made for medical and funeral expenses where decedent left dependents to whom compensation has been awarded.³⁹

§ 1388. **Injuries caused by negligence of third persons.** The right of the injured employee to sue third persons whose negligence caused the injury is usually not affected, the employee being given the option of proceeding against his employer under the act, or the negligent third person at common law. But there can be only one recovery. In Washington, Minnesota and Illinois, however, this right has been very seriously abridged. Under the construction placed upon the Washington act, the remedy provided for therein against the employer is exclusive even where the injury is the result of the negligence of a third person, except where such injury occurs "away from the plant of the employer."⁴⁰

The provisions of the Minnesota and Illinois acts are somewhat similar. Where the third person whose negligence caused the injury is also under the act, the amount of the recovery is limited to the amount recoverable under the act. This restriction has been upheld.⁴¹

Where the employee elects to proceed against the employer under the act, and the latter pays the compensation for the injury, he becomes subrogated to the employee's right of action against the person whose negligence caused the injury, to the ex-

to his family physician for treatment, the reasonable value of the latter's services may properly be allowed him, the evidence supporting the conclusion that the employer and the insurance carrier neglected seasonably to provide the surgical treatment reasonably required, within the meaning of section 15, subdivision (a) of the act. *Massachusetts Bonding & Insurance Co. v. Pillsbury*, 170 Cal. 767, 11 N. C. C. A. 426.

³⁸ Power to fix attorneys' fees is limited to the superior court and the supreme court is not warranted

in fixing the same or granting an additional allowance. *Boyd v. Pratt*, 72 Wash. 306, 3 N. C. C. A. 604n.

³⁹ *Central R. Co. of New Jersey v. Kellett*, 86 N. J. L. 84, 5 N. C. C. A. 529; *Taylor v. Seabrook*, 87 N. J. L. 407, 11 N. C. C. A. 710.

⁴⁰ *Peet v. Mills*, 76 Wash. 437, 4 N. C. C. A. 786, L.R.A.1916A 358; *Northern Pac. Ry. Co. v. Meese*, 239 U. S. 614, 10 N. C. C. A. 939.

⁴¹ *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 5 N. C. C. A. 871.

tent of the amount paid. But this right of subrogation is a creature of the statute and does not exist independently of it.⁴²

Under the Wisconsin act which provides that, when an employee who is injured in the course of his employment by the actionable negligence of a third person, elects to pursue his remedy against the employer for compensation, the latter thereupon, by succession, becomes the owner of the employee's common-law remedy against the third person and may enforce it in his own name, and the right of action thus accruing to the employee may be assigned by him.⁴³

A provision that the making of a lawful claim against an employer for compensation shall operate as an assignment of any cause of action in tort which the employee may have against any other party for his injury, does not cause the making of a claim to operate as an assignment of a cause of action not in existence at the time thereof.⁴⁴

⁴² Where an employee was injured prior to the Act of 1913 (P. L. 1913, p. 320), through the negligence of one not his employer, under such circumstances as to entitle him to compensation from his employer under the Act of 1911 (P. L. 1911, p. 520), the employer could not recover of the tort-feasor for the compensation paid to the employee under the statute; the statutory compensation is a part of the compensation of the employee by services rendered for which the employer receives a *quid pro quo*. The loss to the employer is the value of the services of the employee to him, not the necessary expense of securing them. *Interstate Telephone & Telegraph Co. v. Public Service Elec. Co.*, 86 N. J. L. 26, 5 N. C. C. A. 524.

⁴³ And where the employer assigns it, it is not necessary that the *Suth. Dam. Vol. V.—24.*

assignee, on bringing an action, make the employer a party. *McGarvey v. Independent Oil & Grease Co.*, 156 Wis. 580, 5 N. C. C. A. 803.

⁴⁴ The making of a claim by an injured employee for compensation under the Wisconsin Workmen's Compensation Act does not operate under subdivision 1 of section 2394—25 of such act, to assign to the employer a cause of action for malpractice which accrues to the employee as a result of the negligent treatment of his injury by the physician employed by him when immediately upon his discovery, in the exercise of ordinary diligence, that the physician had been negligent, he refuses to accept from his employer any more of the compensation awarded him. *Pawlak v. Hayes*, 162 Wis. 503, 11 N. C. C. A. 752.

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